Smith College

Record Of: Fable Avison Date Issued:03-28-2022

Fable Avison

Course Level : Undergraduate

Student Type: Undergraduate
Admit Term: 2014 Fall Semester

Program Of Study:
Government Major
Spanish Minor

Events/Comments:
Liberal Arts Commendation
Fall 2016 - PRESHCO/Cordoba

Degree Information:
Degree Awarded: A.B. - Bachelor of Arts 05-20-2018

Subj	No.	Title	Cred	Grade	QPts	R

TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:

2016 Fall Semester PRESHCO Spain

GOV	2XX	Comp Pol Institutes:USA-Spain	4.00	(B
HST	2XX	Eu After Brexit:Hst & Intl Rel	4.00	(B
HST	2XX	Roman Law	4.00	(A-
HST	2XX	Convivencia in Cordoba	4.00	(B

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	0.00	0.00	0.00

AP - Advanced Placement Exam

HST	1XX	HST Elective 100-level	4.00	AP

Earned Hrs	GPA-Hrs	QPts	GPA
4.00	0.00	0.00	0.00

IB - Conversion

ENG	118	Colq in Writing	8.00	AP

Earned Hrs	GPA-Hrs	QPts	GPA
8.00	0.00	0.00	0.00

Subj	No.	Title	Cred	Grade	QPts	R

INSTITUTION CREDIT:

2014 Fall Semester

ANT	130	Intro Cultural Anthropology	4.00	A	16.00
FYS	153	Bollywood Matinee: Gender,Nati	4.00	B+	13.20
GOV	100	Intro to Political Thinking	4.00	A-	14.80
PSY	130	Clinical Neuroscience	4.00	A	16.00

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	16.00	60.00	3.75

2015 Spring Semester

ECO	150	Introductory Microeconomics	4.00	A-	14.80
ESS	901	Aquatic Activ:Scuba Diving	1.00	A	4.00
GER	299	Exhbt Poplr Vis Art/Interw Ger	4.00	A	16.00
GOV	202	American Constitutional Law	4.00	B+	13.20
SPN	200	Intermediate Spanish	4.00	A-	14.80

Subj	No.	Title	Cred	Grade	QPts	R

INSTITUTION CREDIT:

SWG	150	Intro Study of Women & Gender	4.00	A	16.00

Earned Hrs	GPA-Hrs	QPts	GPA
21.00	21.00	78.80	3.75

2015 Fall Semester

ECO	153	Introductory Macroeconomics	4.00	A-	14.80
GOV	241	International Politics	4.00	A-	14.80
GOV	263	Polit Theory of the 19th Cent	4.00	B+	13.20
SPN	220	Contemp Cultr Span-Speak World	4.00	A	16.00
SPN	225	Advanced Composition	4.00	A	16.00

Earned Hrs	GPA-Hrs	QPts	GPA
20.00	20.00	74.80	3.74

2016 Spring Semester

GOV	268	Colq: Scnc Fctn/Pltcl Theory	4.00	A-	14.80
HST	227	Colq:Medieval European History	4.00	S	0.00
PHI	125	Hist of Early Mod European Phi	4.00	S	0.00
SPN	251	Surv Iberian Lit,Art,Societ II	4.00	B	12.00

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	8.00	26.80	3.35

2017 Spring Semester

GOV	203	Empirical Methods in Pol Sci	5.00	B-	13.50
GOV	362	Sem Politicl Theory-Revolution	4.00	C-	6.80
SPN	373	Sem: Literary Movmnt Span Amer	4.00	B	12.00

Earned Hrs	GPA-Hrs	QPts	GPA
13.00	13.00	32.30	2.48

2017 Fall Semester

BIO	100	Human Origins, Human Diversity	4.00	B+	13.20
ENG	112	Reading Contemporary Poetry	2.00	S	0.00
GEO	102	Exploring Local Geo Landscape	2.00	B	6.00
ITL	205	Savoring Italy:Cuisine/Culture	2.00	S	0.00
SPN	373	Sem: Lit Film Transnatnl Imag	4.00	B	12.00

Earned Hrs	GPA-Hrs	QPts	GPA
14.00	10.00	31.20	3.12

Transcript Totals	Earned Hrs	GPA Hrs	Qpts	GPA
TOTAL INSTITUTION	100.00	88.00	303.90	3.45
TOTAL TRANSFER	28.00	0.00	0.00	0.00
OVERALL	128.00	88.00	303.90	3.45

----------END OF TRANSCRIPT----------

Gretchen B. Herringer
Smith College Registrar

The Honorable Jill Aiko Otake
United States District Court
District of Hawaii
300 Ala Moana Blvd C-338
Honolulu, HI 96850
(808) 541-1300

Dear Judge Otake,

I write to recommend Fable Avison for a judicial clerkship. I can do so enthusiastically and confidently because, as my research assistant, she is doing the tasks that I once did as a law clerk for Judge Spottswood W. Robinson of the DC Circuit but to a higher standard than I did.

As my research assistant, Ms. Avison is helping me write a book about the function of accountability under the federal constitution. My practice is to give her rough drafts of chapters and ask her to do the legal and factual research to help me make my points more convincingly. That she does, and very well. Indeed, she finds sources from far afield. Along the way, she gently suggests line edits to comb the style into shape. This is precisely the sort of work product that the very best of my research assistants have done over the decades.

She, however, does something else. She sometimes suggests rearranging of the order of my arguments to make them, she claims, more convincing. I usually agree with her. This contribution has surprised me because none of my research assistants over the decades have done that. And she does it in the gentlest of ways. I can see why the law review made her Executive Notes and Comments Editor.

The book that I am writing draws upon both political theory and Greek mythology. So, it is an additional blessing that she is knowledgeable in these fields. Her specific fields of knowledge are not, however, the point. The point is she is a thoughtful helper who takes initiative and delivers. She has kept every promise

I heartily recommend Fable. Should you have any questions, please feel free to contact me.

Sincerely,

David Schoenbrod

Re: Letter of Recommendation for Fable Avison

The Honorable Jill Aiko Otake

United States District Court
District of Hawaii
300 Ala Moana Blvd C-338
Honolulu, HI 96850
(808) 541-1300

Dear Judge Otake,

I am writing on behalf of Ms. Fable J. Avison who is applying for a clerkship with Your Honor.

I first met Ms. Avison in the Spring Semester of 2022 when she enrolled in my "Federal Courts" course. This courses has the reputation, as it does at many schools, of being particularly difficult and demanding, and for the most part it commonly attracts only the school's top students. Given her general record at New York Law School and her editorial position on the school's law review, Ms. Avison obviously came within that category.

In this class context, Ms. Avison excelled. Throughout the semester she was consistently well prepared and able to respond to challenging questions about the material. Her comments were invariably thoughtful and often incisive, and her questions were consistently to the point and often probing and provocative. In the end she proved to be one of the top two students in the class. She wrote two very good papers on short writing assignments and on the final exam earned the highest grade in the class. All in all, she made a substantial contribution to the discussions and was a pleasure to have as a student.

Intellectually, Ms. Avison is a quick study who readily spots both issues and their complexities on the first go-through and, even more important, does not stop with her initial understanding. Rather, she continues to grapple with those issues and complexities and pushes herself to think her way through whatever deeper problems they present. Whenever someone in the class made an acute point or offered a perceptive comment, her face usually lit up in immediate recognition.

More generally, Ms. Avison is a most engaging and impressive young woman. From her high school years she has been a leader in a variety of projects and organizations, and she has consistently shown the admirable qualities of ambition, determination, and commitment to hard work. She is broadly inquisitive, wide-ranging in her interests, active in a variety of social and political causes, and intensely motivated in pursuing a legal career that will allow her to help others. She has already applied herself energetically to gain considerable legal experience. She worked as an assistant in a law firm for approximately two years and secured two different legal externships as well as a judicial internship in the United States District Court for the District of New Jersey. As for the future, she has told me that her greatest hope is that she will be able to obtain a year or two-year federal judicial clerkship, a goal that she has cherished since college.

In personal terms, Ms. Avison is a congenial young woman who listens carefully to others and fits in nicely in a classroom situation. While her comments and analyses are sharp, her treatment of others is never so. Rather, she responds appropriately in the context while remaining attentive, even-tempered, and respectful.

I am confident that Ms. Avison would adapt smoothly to the work load and personal requirements in any judicial chamber and that she would quickly become a highly reliable and valued law clerk. Her practical experiences working in a law firm and taking part in two externships and a judicial internship would enable her to hit the ground running.

I recommend Ms. Avison for a clerkship with Your Honor with the greatest enthusiasm and confidence.

In the event I might be able to provide any additional information, I would be more than happy to do so.

Respectfully,

Edward A. Purcell, Jr.

Joseph Solomon Distinguished Professor

June 25, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Reference for Fable Avison

Dear Judge Walker:

I am writing to offer my unqualified and enthusiastic support for Fable Avison's application for a clerkship in your chambers. Fable took Constitutional Law I with me in Fall 2021 and is currently completing Constitutional Law II with me this Spring. Her maturity, intelligence, and deep commitment to high standards place her among the top students I've worked with in the last few years, and I hope you will give her application serious consideration.

From the first day of class, Fable distinguished herself as a student who was deeply engaged with the material, intellectually curious, articulate, motivated, and well prepared. She actively engaged with difficult areas of legal doctrine, asked incisive questions, and consistently demonstrating her ability to carefully parse complex cases and analyze arguments on both sides of a dispute. Throughout the year, her enthusiasm for constitutional law has shone through in a way that would make any professor proud, and I repeatedly saw her work closely with other students to explain material and improve their understanding of the law. As a result, I plan to offer her a position as a teaching assistant when I teach the course next year.

On a personal level, Fable is extremely nice and congenial. She is exactly the sort of person I would look for in a judicial clerk: hard-working, professional, smart, thorough, responsible, easy to work with, and eager to learn. Fable is also extremely excited about the possibility of clerking and has consciously selected classes and externship opportunities that will allow her to hit the ground running.

In sum, I have no hesitation in offering Fable my highest recommendation for the clerkship position. I have no doubt that Fable will make an excellent attorney one day, and that she will benefit immeasurably from the opportunity to work with you. If you have any additional questions, please feel free to contact me by email at doni.gewirtzman@nyls.edu or by phone at 212-431-2134.

Sincerely,

Doni Gewirtzman
Professor of Law

June 25, 2023

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Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

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Sincerely,

David Schoenbrod

David Schoenbrod - David.Schoenbrod@nyls.edu - 212.431.2339

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Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

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Edward Purcell - edward.purcell@nyls.edu - 212-431-2856

Fable J. Avison
Fable.Avison@law.nyls.edu | (732) 610-2225 | Jersey City, NJ 07302

Writing Sample

Attached is a copy of my Case Comment that I authored in the fall semester of 2021 as a Junior Staff Editor of the *New York Law School Law Review*. My Comment has been selected for publication in Volume 67. For my Comment, I selected a case decided in the Southern District of New York in 2021, *Zurich American Life Insurance Company v. Nagel*. The case is about a former employee, who leveraged his possession of confidential company documents on his personal computers in order to coerce severance after his employment was terminated. The plaintiff brought suit under various state and federal laws, including the Defend Trade Secrets Act (DTSA), alleging that the defendant misappropriated company trade secrets when he sought severance pay in exchange for the return of the confidential information. The court considered whether the defendant had "used" trade secrets within the meaning of the DTSA and concluded that he had not because he had not opened, disclosed, or relied on them.

My Comment first contends that the court should have used the ordinary meaning of "use" and should not have restricted the applicability of the statute by "type" of use. Second, the Comment argues that the court failed to analyze the misappropriation claim under existing persuasive precedent which guides that confidentiality agreements demonstrate that secrets were acquired improperly, therefore, triggering the statute. My comment raises unique legal theories to argue against the court's decision to limit the scope of the statute. The Comment was reviewed and graded by the outgoing Executive Notes and Comments Editor. Minor edits and suggested changes have been made. The Comment has not been edited by the current Editorial Board for publication.

Zurich Am. Life Ins. Co. v. Nagel[1]

When man began to tie his fences, society as we know it began.[2] The foremost features of everyday American life,[3] like public transportation, the stock market, and technology we rely on for almost all our daily tasks have each resulted from the privatization of property.[4] The right to own property has always been considered an unalienable right, and part of the very essence of this country since its inception over two-hundred years ago.[5] The framers of the United States Constitution were notably influenced by Enlightenment and natural political philosophers like John Locke,[6] whose quintessential theory of private property stated that when man mixes his labor with an object, it becomes his property—and becomes excluded from others.[7] Over the last few centuries, American Revolutionary historians have written[8] about the similarities between the theory of "unalienable rights" in Thomas Jefferson's draft of the Declaration of Independence and Locke's theory of property.[9] It is hard to imagine society without philosopher Locke's theory of private property at the center to protect society's efforts and productivity.[10] Economist Adam Smith's foundational theory for *The Wealth of Nations* was premised on the fact that societies became more efficient as labor became specialized through privatization.[11] Specialization leads to

[1] Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d. 396 (S.D.N.Y. 2021).
[2] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288–89 (Student Ed.) (Peter Laslett ed., 1988) ("[T]hat 'tis the taking any part of what is common, and removing it out of the state Nature leaves it in, which *begins the Property;* without which the Common is of no use.").
[3] *See* Thomas Jefferson, *Letter to Samuel Kercheval*, TEACHING AM. HIST. (July 12, 1816), https://teachingamericanhistory.org/document/letter-to-samuel-kercheval/ ("The true foundation of republican government is the equal right of every citizen, in his person and property, and in their management.").
[4] *See* Wolfgang Kasper, COMPETITION, https://www.econlib.org/library/Enc/Competition.html (last visited Nov. 21, 2021) ("This type of [economic] competition has inspired innumerable evolutionary steps—between the Wright brothers' first fence hopper and the latest Boeing 747, for example.").
[5] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[6] *See* Roger Pilon, *Cato Handbook for Policymakers:16. Property Rights and the Constitution*, 8 CATO INST. 173 (2017), https://www.cato.org/sites/cato.org/files/serials/files/cato-handbook-policymakers/2017/2/cato-handbook-for-policymakers-8th-edition-16_0.pdf.
[7] *See* LOCKE, *supra* note 2, at 290–91 ("He by his Labour does, as it were, inclose it from the Common.").
[8] *E.g.*, Carli N. Conklin, *The Origins of the Pursuit of Happiness*, 7 WASH. U. JURIS. REV. 195, 224–28 (2015) (discussing the significance of Jefferson's drafting).
[9] *See* Locke, *supra* note 7 ("Man being born…hath by Nature a Power, not only to preserve his Property, that is, his Life, Liberty, and Estate, against the Injuries and Attempts of other Men.").
[10] *See* Pilon, *supra* note 6 (commenting on the prevalence of Locke's theory in the ethics of American government).
[11] *The Wealth of Nations*, ADAM SMITH INST., https://www.adamsmith.org/the-wealth-of-nations (last visited Nov. 21, 2021) ("Another central theme is that this productive capacity rests on the division of labour and the

innovation.[12] Thus, the greatest threat to innovation, and to our society, is a loss of protection for productivity.[13] When ideas and inventions are not protected efforts are not rewarded, and a society that is not rewarded for its efforts in turn has no reason to innovate.[14] Trade secrets are a form of intellectual property, and encompass nearly all forms of business information such as strategy, plans, pricing, costs, and even corporate governance documents pertaining to the way a business is run.[15] Trade secret laws enable modern innovations by protecting intangible and invaluable information.[16] Federal laws enable citizens in every state to sue violators of trade secrets laws in federal court, to protect personal property and the American economy.[17]

In May of 2021, the Southern District of New York ("Southern District") examined a question of first impression in *Zurich American Life Insurance Co. v. Nagel*.[18] The court was asked to determine whether one "uses" a trade secret when he leverages possession of that secret against its owners as a means of extortion under the Defend Trade Secrets Act[19] (DTSA).[20] The court held that use of trade secrets to exploit the secrets' owner does not amount to a misappropriation under the DTSA and dismissed the plaintiff's DTSA claim for failure to state a claim.[21] The court reasoned that Nagel had not misappropriated trade secret information because he had not acquired the information improperly, nor had he actually used it.[22]

This case comment contends that the *Zurich* court erred when it dismissed plaintiff Zurich American Life Insurance Company's ("Zurich") DTSA claim.[23] First, the court failed to properly assess Zurich's claim of misappropriation under the DTSA when it did not consider persuasive

accumulation of capital that it makes possible. Huge efficiencies can be gained by breaking production down into many small tasks, each undertaken by specialist hands.").
[12] *See* Kasper, *supra* note 4 (commenting on the material progress that is created by competition between specialized sellers).
[13] *See Id*.
[14] *Id*.
[15] James A. Johnson, *Keeping Your Secrets Secret*, 87-AUG N.Y. St. B.J. 24, 24–25 (2015).
[16] *Id*.
[17] *See Id*.; *see also* 18 U.S.C. § 1836.
[18] Zurich Am. Life Ins. Co. v. Nagel, No. 538 F. Supp. 3d 396, 403 (S.D.N.Y. 2021).
[19] 18 U.S.C. § 1836.
[20] *Zurich Am. Life Ins. Co.*, 539 F. Supp. 3d. at 403.
[21] *Id.* at 403–06.
[22] *Id*.
[23] *Id.* at 403–06 (holding that Zurich failed to bring an actionable claim of misappropriation under the DTSA).

precedent dictating that the violation of confidentiality agreements is evidence of acquiring secrets through improper means.[24] Second, the court erred in applying an unduly restrictive definition of the word "use" from the DTSA when it did not consider the leveraging the possession of trade secrets during settlement negotiations to be a "use" under the statute.[25] Overall, the court failed to embody Congress's clear purpose and closed the door to plaintiffs seeking a remedy in federal court to defend their trade secrets from former employees and others.[26]

In 2011, Zurich hired John Nagel to work as a senior paralegal.[27] Nagel supported Zurich's attorneys and senior management with corporate governance, a role which put highly confidential information in his hands.[28] As such, Nagel signed a nondisclosure agreement (the "Agreement")[29] as part of his employment.[30]

Beginning in October of 2020, Zurich commenced an ongoing internal audit, during the course of which it discovered that Nagel had sent more than sixty confidential and proprietary documents to his personal email account between March and November of 2020.[31] The emails contained confidential information including corporate governance documents, board resolutions,

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[24] *Compare id*. (considering only Nagel's work-from-home allowance and not the terms of his employment agreement prohibiting the production of unauthorized copies), *with* Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x 447, 450 (2d Cir. 2021) (holding that when a plaintiff does not protect their secrets with a duty to maintain secrecy, there is no plausible misappropriation), *and* Intertek Testing Servs., N.A., Inc. v. Pennisi, No. 19-CV-7103, 2020 WL 1129773, at *340–42 (E.D.N.Y. Mar. 9, 2020) (concluding that evidence of a breach of a confidentiality agreement was evidence of misappropriation of trade secrets).

[25] *Zurich Am. Life Ins. Co.*, 539 F. Supp. 3d at 403–06.

[26] *See* H.R. REP. NO. 114-529, at 5 (2016) ("The Act defines misappropriation as acquisition of a trade secret by improper means, disclosure or use of a trade secret by a person who had reason to know that the trade secret was acquired by improper means or under circumstances giving rise to a duty of secrecy, or disclosure or use of a trade secret by a person who had reason to know it was disclosed by accident or mistake.").

[27] *Zurich Am. Life Ins. Co.*, 538 F. Supp. 3d at 399. Nagel supported Zurich's attorneys and senior management with corporate governance matters. Defendant's Brief at 2, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091) [hereinafter "Defendant's Brief"].

[28] Defendant's Brief, *supra* note 28.

[29] Nagel signed a document titled "Agreement Relating to Proprietary Information/Equipment/Work Development," which specified that during and after employment, Nagel would not "disclose, use for [him]self or others, make unauthorized copies of, alter or modify in anyway [*sic*], or take with me such Proprietary Information." Complaint at 5, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091) [hereinafter Complaint].; *see* Plaintiff's Exhibit A, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091).

[30] Complaint, *supra* note 30, at 4–5. The Agreement also specified that, upon his termination, Nagel was to return all documents. *Id*.

[31] Complaint, *supra* note 30, at 5. Zurich conducted an internal audit after a budget review revealed that Nagel's compensation was "significantly higher than expected." *Id*.

financial reports, and sensitive personal information about Zurich senior executives.[32]

After learning about Nagel's misconduct on November 5, 2020, Zurich immediately fired Nagel.[33] Zurich sent a demand letter to Nagel promising to take legal action unless he returned all confidential and proprietary information and consented to imaging and forensic analysis.[34] Nagel refused.[35]

Rather, Nagel threatened an age discrimination lawsuit against Zurich.[36] In response to Zurich's demand letter, Nagel's attorney spoke with counsel for Zurich in response to its demand letter and stated that Nagel would only provide the requested assurances in exchange for severance pay and the clearing of his record.[37] Zurich did not concede.[38] As a result, Nagel filed his complaint against Zurich in the New York State Supreme Court on December 29, 2020.[39] The next day, Zurich filed its four-count complaint in the Southern District of New York, alleging breach of contract and fiduciary duty, violations of the DTSA, and unjust enrichment.[40]

On March 24, 2020, Nagel responded[41] by filing a motion to strike portions of the

[32] Complaint, *supra* note 30, at 6–7.
[33] Plaintiffs' Reply Brief at 4, Zurich Am. Life Ins. Co.v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091) [hereinafter Plaintiff's Brief]; Complaint, *supra* note 30, at 7. Zurich accused Nagel of falsifying time sheets and other misconduct. *Zurich Am. Life Ins. Co*., 538 F. Supp. 3d at 399.
[34] Complaint, *supra* note 30, at 5 ("Zurich sent a demand letter dated November, 6, 2020, to Nagel which requested that he return all hard-copy documents containing Zurich confidential and proprietary information and submit his computer, phone, and other electronic devices, as well as his personal email accounts, for imaging and forensic analysis to ensure the return of all Zurich confidential and proprietary information.").
[35] Defendants Brief, *supra* note 28, at 3. Nagel, through his attorney Thomas Budd, contacted counsel for Zurich to confirm his receipt of the November 6 letter and declined to return the documents or to submit Nagel's devices to Zurich's inspection. Complaint, *supra* note 30, at 7.
[36] Defendant's Brief, *supra* note 28, at 10. Nagel filed a civil lawsuit in the New York Supreme Court on December 29, 2020, alleging that Zurich discriminated and retaliated against him by terminating his employment after he complained of age discrimination just three days before his 70th birthday. *Id*.
[37] Complaint, *supra* note 30, at 8; Defendants Brief, supra note 28, at 3.
[38] Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396, 399 (S.D.N.Y. 2021); Defendant's Brief, *supra* note 28, at 4.
[39] Defendant's Brief, *supra* note 28 at 4. Nagel alleged that Zurich retaliated against him due to previous complaints of age discrimination, three days before his 70th birthday. *Id*.
[40] *Zurich Am. Life Ins. Co*., 538 F. Supp. 3d at 399; *see generally* Complaint, *supra* note 30 at 1.
[41] *Zurich Am. Life Ins. Co*., 538 F. Supp. 3d at 399; Defendant's Notice, *supra* note 42, at 1.

complaint[42] or, in the alternative, to dismiss all claims.[43] Nagel argued that Zurich had failed to show that he had misappropriated trade secrets and that portions of the complaint which discussed settlement negotiations should be struck.[44] On May 7, 2021, the court issued an order granting in part and dismissing in part Nagel's motion.[45] A written opinion followed on May 11, 2021,[46] dismissing Zurich's DTSA and unjust enrichment claims pursuant to Federal Rules of Civil Procedure ("FRCP") 12(b)(6).[47] The case continues presently, on different legal grounds.[48] On May 21, 2021, Zurich filed its amended complaint, alleging breach of contract and fiduciary duties, and fraud.[49] Nagel filed a counterclaim, accusing Zurich of tortious interference with employment,[50] defamation,[51] and age discrimination[52] under the New York State Human Rights Law, and retaliation under both the City[53] and State[54] Human Rights Laws.[55]

The DTSA was signed into law by President Barack Obama on May 11, 2016.[56] Prior to the enactment of the DTSA, state law governed trade secrets.[57] The DTSA amended the federal

[42] Nagel requested that the court strike portions of Zurich's complaint that referred to email correspondence between his attorney and counsel for Zurich pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Defendant's Notice of Motion at 1, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091) [hereinafter Defendant's Notice]; Fed. R. Civ. P. 12(f).
[43] Nagel requested that the court dismiss all claims pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *Zurich Am. Life Ins. Co.*, 538 F. Supp. 3d at 399; Defendant's Notice, *supra* note 42, at 1.
[44] Defendant's Brief, *supra* note 28, at 5–6 ("Certain Paragraphs And Exhibit C To The SDNY Complaint Must Be Struck Pursuant To FRCP 12(f) Because They Contain Inadmissible Settlement Communications[.]"); *id.* at 12–17 (arguing Zurich failed to allege the existence of a trade secret with independent economic value, and that Zurich did not allege that Nagel acquired trade secrets through improper means or that Nagel used the trade secrets improperly, or that Nagel threated to use or disclose trade secrets).
[45] May 7 Order, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091) (concluding that Zurich failed to properly allege that Nagel misappropriated trade secrets under the DTSA).
[46] Order Granting in Part and Denying in Part Defendant's Motion at 1, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091) [hereinafter Order]..
[47] Order, *supra* note 47, at 1. Nagel's motion was made pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *Id.* (citing Fed. R. Civ. P. 12(b)(6)).
[48] *See* Order, *supra* note 47, at 1. (dismissing plaintiff's DTSA claim).
[49] Amended Complaint, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091).
[50] Counterclaim at 41–42, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091) [hereinafter Counterclaim].
[51] Counterclaim, *supra* note 51, at 40–41.
[52] Counterclaim, *supra* note 51, at 36–37.
[53] Counterclaim, *supra* note 51, at 39.
[54] Counterclaim, *supra* note 51, at 40.
[55] Counterclaim, *supra* note 51, at 39.
[56] Remarks on Signing the Defend Trade Secrets Act 2016, Daily Comp. Pres. Doc. 309 (May 11, 2016).
[57] S. Rep. No. 114-220, at 2 (2016).

criminal code[58] to provide a private cause of action for trade secrets misappropriation claims.[59] The bill was introduced to combat the economic threat that trade secrets misappropriation posed to the U.S. economy in 2016.[60] Prior to the enactment of the DTSA, the Commissioners on Uniform State Laws[61] had already adopted the Uniform Trade Secrets Act[62] (UTSA) in 1985 in an effort to centralize trade secrets law.[63] However, Congress, aware of the inherent discrepancies in adopting and applying the UTSA state-to-state,[64] created a federal law to give trade secret owners a remedy in federal courts.[65] The DTSA protects trade secret owners from misappropriation.[66] However, as with any statute,[67] Congress did not define all the terms of the DTSA, leaving some to the interpretation of federal courts.[68]

In 1993, in *Smith v. United States*,[69] the United States Supreme Court held that trading a gun fell within the meaning of "using" a gun under 18 U.S.C.§ 924(c)(1).[70] The Court applied the plain meaning rule when it analyzed the statute.[71] The petitioner argued that "use" of a firearm

[58] 18 U.S.C. § 1836
[59] 114th Congress, 20161890, CRS Summary S.1890 (2016).
[60] S. Rep. No. 114-220, at 2 (2016) ("[T]he Commission on the Theft of American Intellectual Property estimated that annual losses to the American economy caused by trade secret theft are over $300 billion.").
[61] The Uniform Law Commission is a non-profit organization that studies, drafts, and proses uniform laws in all areas to promote uniformity across the United States. *About Us*, UNIF. L. COMM'N., https://www.uniformlaws.org/aboutulc/overview.
[62] Unif. Trade Secrets Act, 14 U.L.A. (1985). To date forty-eight out of the fifty states have adopted the UTSA. New York is not among them. *Trade Secrets Law*, UNIF. LAW COMM'N. https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792 (last visited Nov. 20 2021).
[63] S. Rep. No. 114-220, at 2 (2016).
[64] *Id.* at 2–3 ("Although the differences between State laws and the UTSA are generally relatively minor, they can prove case-dispositive.").
[65] The Economic Espionage Act of 1996 ("EEA") makes misappropriating trade secrets a federal crime but does not give private citizens recourse under the statute. *Id.*
[66] 18 U.S.C. § 1836.
[67] *See* LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2014) ("Still, the meaning of statutory language is not always evident.").
[68] *See generally* ExpertConnect, L.L.C. v. Fowler, No. 18-CV-4828, 2019 WL 3004161, at *5–6 (S.D.N.Y. July 10, 2019) (interpreting the required elements of misappropriation); Intertek Testing Servs., N.A., Inc. v. Pennisi, No. 19-CV-7103, 2020 WL 1129773, at *342 (E.D.N.Y. Mar. 9, 2020) (holding that breach of a confidentiality agreement was an improper acquisition of trade secrets); Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x 447, 451 (2d Cir. 2021) (holding that lack of employee-employer confidentiality agreement was sufficient evidence that the plaintiff failed to guard against the misappropriation of his trade secrets); Oakwood Lab'ys LLC v. Thanoo, 999 F.3d 892, 908 (3d Cir. 2021) (determining the meaning of "use" under the DTSA).
[69] 508 U.S. 223 (1993).
[70] *Smith*, 508 U.S. at 225.
[71] *Id.* at 241.

should have been limited to firing or threatening to fire a gun.[72] Writing on behalf of the Court, Justice O'Connor proclaimed: "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."[73] The Court turned the petitioner's argument on its head, concluding that construing "use" to include leveraging the gun for a drug-buy[74] and considered all of the ways to "use" a gun within the ordinary meaning of the word.[75] The Court ultimately held that leveraging a gun for illegal drugs during a drug related crime was exactly the kind of conduct the law aimed to prevent,[76] and therefore constituted a "use" under 18 U.S.C.§ 924(c)(1).[77]

In 1998, in *Bragdon v. Abbot*,[78] the United States Supreme Court used the plain meaning rulein determining that, in the Americans with Disabilities Act,[79] "disability" included HIV infections, and thereby prohibited discrimination on that basis.[80] The *Bragdon* Court relied upon a body of uniform administrative and judicial decisions,[81] holding that HIV fit within the definition of "disability" within the Act.[82] The *Bragdon* Court's holding rested in part on the importance of maintaining uniform construction of the term.[83]

The DTSA itself has also been subject to interpretation by the federal courts.[84] In 2019, in

[72] *Id.* at 230–32.
[73] *Id.* at 228 (citing Perrin v. United States, 444 U.S. 37, 42 (1979)).
[74] *Id.* at 230–31.
[75] *Id.*
[76] *Id.* at 241 ("Both a firearm's use as a weapon and its use as an item of barter fall within the plain language of § 924(c)(1), so long as the use occurs during and in relation to a drug trafficking offense… both create the very dangers and risks that Congress meant § 924(c)(1) to address.").
[77] *Id.*
[78] Bragdon v. Abbott, 524 U.S. 624 (1998).
[79] Americans With Disabilities Act of 1990 42 U.S.C. § 12101.
[80] *Bragdon*, 524 U.S. at 645 ("[T]he legislative record indicates that Congress intended to ratify HUD's interpretation when it reiterated the same definition in the ADA.").
[81] *Id.* at 642 ("Our holding is confirmed by a consistent course of agency interpretation before and after enactment of the ADA.").
[82] *Id.* at 645 ("The uniform body of administrative and judicial precedent confirms the conclusion we reach today as the most faithful way to effect the congressional design.").
[83] *Id.* ("We find the uniformity of the ... judicial precedent construing the definition significant.").
[84] *See, e.g.* ExpertConnect, L.L.C. v. Fowler, No. 18-CV-4828, 2019 WL 3004161 (S.D.N.Y. July 10, 2019); Bramshill Invs., LLC v. Pullen, No. 19-CV-18288, 2020 WL 4581827 (D.N.J. Aug. 10, 2020); Intertek Testing Servs., N.A., Inc. v. Pennisi, No. 19-CV-7103, 2020 WL 1129773 (E.D.N.Y. Mar. 9, 2020); Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x 447 (2d Cir. 2021); Oakwood Lab'ys LLC v. Thanoo, 999 F.3d 892 (3d Cir. 2021); Zurich Am. Life Ins. Co. v. Nagel, No. 20-CV-11091, 2021 WL 1877364 (S.D.N.Y. May 11, 2021).

deciding *ExpertConnect, LLC v. Fowler*,[85] the Southern District recited the required elements for a misappropriation claim under the DTSA as (1) acquiring a trade secret by improper means, or (2) disclosing or using the trade secret without consent.[86]

In 2020, in *Intertek Testing Services, N.A., Inc. v. Pennisi*,[87] the Eastern District of New York ("Eastern District") considered whether the defendants misappropriated trade secrets in violation of the DTSA when they acquired them improperly by forwarding confidential information to personal email addresses, in breach of their employment contracts.[88] The court held that defendants acquired trade secrets by improper means because they breached their duty to maintain secrecy per their agreements.[89]

That same year, in *Bramshill Investments, LLC v. Pullen*,[90] the District of New Jersey held that plaintiff sufficiently pled misappropriation under the DTSA because she referenced a company policy forbidding employees from emailing company documents to personal email accounts.[91] One year later, in *Mason v. Amtrust Financial Services Inc.*,[92] the Second Circuit Court of Appeals considered implications of confidentiality agreements.[93] The court held that the plaintiff failed to take reasonable measures to guard against misappropriation of his trade secrets because he did not require his employer to sign a confidentiality agreement when he allowed them to use his proprietary pricing model.[94]

In 2021, in *Oakwood Laboratories LLC. v. Thanoo*,[95] the Third Circuit Court of Appeals, considered whether a defendant misappropriated trade secrets by "using" his knowledge to gain employment with a competitor.[96] The court concluded that defendants do not need to specifically

[85] ExpertConnect, L.L.C. v. Fowler, 2019 WL 3004161, at *5–6.
[86] *Id.* (citing AUA Private Equity Partners, LLC v. Soto, No. 17-CV-8035, 2018 WL 1684339, at *4 (S.D.N.Y. Apr. 5, 2018)).
[87] Intertek Testing Servs., N.A., Inc. v. Pennisi, 2020 WL 1129773.
[88] *Id.* at *310–25.
[89] *Id.* at *342.
[90] Bramshill Invs., LLC v. Pullen, No. 19-CV-18288, 2020 WL 4581827 (D.N.J. Aug. 10, 2020).
[91] *Id.*
[92] Mason v. Amtrust Fin. Servs., 848 F. App'x 447 (2d Cir. 2021).
[93] *Id.* at 450.
[94] *Id.*
[95] 999 F.3d 892 (3d Cir. 2021).
[96] *Id.*

replicate or disclose information to have "used" the information in violation of the statute.[97] The court applied the ordinary meaning of the word "use" to the DTSA, holding that this was consistent with the statutory purpose.[98] Ordinary language and common dictionaries define "use" broadly and include employing something for the user's benefit.[99] Thus, the *Thanoo* court applied the plain meaning of use to the statute.[100]

In 2021, *Zurich American Life Insurance Co. v. Nagel* required the Southern District to determine whether using trade secrets for extortion constituted a "use" of trade secrets under the misappropriation standard of the DTSA.[101] Zurich argued that Nagel acquired trade secrets by improper means when he violated his employment agreement[102] by forwarding confidential information to his personal email address and accessing the information from unauthorized[103] personal devices.[104] Nagel argued that because his agreement did not explicitly forbid forwarding emails containing proprietary information,[105] Zurich had failed to allege misappropriation within the *ExpertConnect, LLC* court's definition.[106] Nagel distinguished *Bramshill Investors, LLC v. Pullen*, noting that Bramshill had a specific company policy against emailing documents to a personal account.[107]

The court concluded that Zurich failed to allege either of the required elements of a DTSA

[97] *Id.* at 908.
[98] *Id.* at 908–10 (holding that construing the word "use" narrowly failed to penalize the variety of activity which the statute intends to criminalize in order to defend fair competition practices).
[99] Use is defined as "the application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional." *Use*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[100] Oakwood Lab'ys. LLC., at 908–10.
[101] Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396, 403–06 (S.D.N.Y. 2021).
[102] Complaint, *supra* note 30, at 4–5.
[103] Nagel's employment agreement expressly prohibited Nagel to "disclose, use for [himself] or others, make unauthorized copies of, alter or modify in anyway [*sic*], or take with [him] such Proprietary Information." *Id.*
[104] Plaintiff's Brief, *supra* note 34, at 17.
[105] Complaint, *supra* note 30, at 5. The agreement made it prohibited conduct for Nagel to "disclose, use for [himself] or others, make unauthorized copies of, alter or modify in anyway [*sic*], or take with [him] such Proprietary Information. *Id.*
[106] Defendant's Brief, *supra* note 28, at 15. The *ExpertConnect, L.L.C.* court defined the elements as "(1) acquiring a trade secret by improper means, or (2) disclosing or using the trade secret without consent." ExpertConnect, L.L.C. v. Fowler, No. 18-CV-4828, 2019 WL 3004161, at *5–6 (S.D.N.Y. July 10, 2019) (citing AUA Private Equity Partners, LLC v. Soto, No. 17-CV-8035, 2018 WL 1684339, at *4 (S.D.N.Y. Apr. 5, 2018)).
[107] Defendant's Brief, *supra* note 28, at 15–16 (citing Bramshill Invs., LLC v. Pullen, No. 19-CV-18288, 2020 WL 4581827 (D.N.J. Aug. 10, 2020)).

claim.[108] First, the court determined that Zurich's pleadings did not reference specific trade secrets protected under the DTSA[109] because it failed to allege the existence of specific trade secrets with independent economic value.[110] While Zurich would have normally been afforded the opportunity to cure its defective pleadings before trial,[111] the court reasoned that the claim would still fail to allege actual or threatened misappropriation of trade secrets under the DTSA.[112] The court cited *ExpertConnect, LLC*. court's[113] reference to the DTSA's definition of misappropriation as (1) acquiring a trade secret by improper means, or (2) disclosing or using the trade secret without consent.[114] The court, though not persuaded by Nagel's specific arguments, found that Zurich failed to show that Nagel acquired the information improperly and determined that Nagel was authorized to acquire the information he possessed as part of his job while working remotely.[115]

Zurich's surviving allegation of misappropriation, that Nagel used Zurich's trade secrets as leverage during settlement negotiations before the suit commenced,[116] posed a question of first impression before the court for the purposes of the DTSA: Does one misappropriate a trade secret, when he is in possession of the trade secret and extorts the trade secret's owner, without disclosing, or necessarily even accessing, the contents of the trade secret?[117] The court's answer was no.[118] The *Zurich* court distinguished the case from *Bramshill Investments, LLC*,[119] noting the issue addressed in *Bramshill* was the defendant's actual disclosure of trade secrets rather than his

[108] 18 U.S.C. § 1836 ("An owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.").
[109] Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396, 404 (S.D.N.Y. 2021) ("These allegations are insufficiently precise to demonstrate the existence of a trade secret under the DTSA.").
[110] *Id*.
[111] *Id*. at *6.
[112] *Id*.
[113] ExpertConnect, L.L.C. v. Fowler, No. 18-CV-4828, 2019 WL 3004161, at *5–6 (S.D.N.Y. July 10, 2019).
[114] *Id*. (citing AUA Private Equity Partners, LLC v. Soto, No. 17-CV-8035, 2018 WL 1684339, at *4 (S.D.N.Y. Apr. 5, 2018)).
[115] *Zurich Am. Life. Ins. Co.*, 538 F. Supp. 3d at 405. The court based its determination on the fact that Zurich had authorized employees to work remotely as part of the COVID-19 pandemic making the sending of confidential information proper. *Id*.
[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] Bramshill Invs., LLC v. Pullen, No. 19-CV-18288, 2020 WL 4581827 (D.N.J. Aug. 10, 2020).

improper acquisition of the information.[120] The court did not address whether Nagel misappropriated information by acquiring it improperly, and focused solely on Nagel's alleged "use" of information.[121] The court determined that by leveraging the information during settlement, Nagel had not improperly "used" the trade secrets because he had not actually disclosed them or relied on their contents.[122] The Southern District dismissed Zurich's DTSA claim and adopted a narrow construction of the term "use" for the meaning of misappropriation in the DTSA.[123]

The *Zurich* court erred when it dismissed Zurich's DTSA claim.[124] First, the court failed to properly assess Zurich's claim of misappropriation under the DTSA when it did not consider persuasive precedent dictating that the violation of confidentiality agreements is evidence of acquiring secrets through improper means.[125] Nagel misappropriated trade secrets when he acquired the information improperly, in violation of his employment agreement.[126] Confidentiality agreements are evidence that an employer is bound to secrecy, and breach of a confidentiality agreement demonstrates that an employee violated their duty to maintain secrecy, thereby acquiring the trade secrets by improper means.[127]

In 2020, in *Intertek Testing Services, N.A., Inc.*, the Eastern District held that defendants misappropriated trade secrets under the DTSA, when they acquired them improperly.[128] The court

[120] *Id.*
[121] *Zurich Am. Life Ins. Co.*, 538 F. Supp. 3d at 405.
[122] *Id.* (considering whether Nagel's offer to exchange possession of the confidential and proprietary information in exchange for consideration during settlement constituted an improper "use" of the information).
[123] *Id.* at 404–06.
[124] *Id.* at 403–06 (holding that Zurich failed to bring an actionable claim of misappropriation under the DTSA.).
[125] *Compare Zurich Am. Life Ins. Co*, 538 F. Supp. 3d at 403–06, *with* Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x 447, 450 (2d Cir. 2021) (holding that when a plaintiff does not protect their secrets with a duty to maintain secrecy, there is no plausible misappropriation), *and* Intertek Testing Servs., N.A., Inc. v. Pennisi, No. 19-CV-7103, 2020 WL 1129773, at *340–42 (E.D.N.Y. Mar. 9, 2020) (concluding that evidence of a breach of a confidentiality agreement was evidence of misappropriation of trade secrets).
[126] Complaint, *supra* note 30, at 4–5.
[127] *See Mason*, 848 F. App'x at 450 (holding that plaintiff did not take reasonable steps to protect his trade secrets because he did not ask his employer to sign a confidentiality agreement when he agreed to their use of his proprietary pricing model); *Intertek Testing Servs., N.A., Inc.*, 2020 WL 1129773, at *340–42 (holding that plaintiff introduced sufficient evidence indicating that defendants misappropriated trade secrets by acquiring the information in plain violation of their employment agreements).
[128] *Intertek Testing Servs., N.A., Inc.*, 2020 WL 1129773.at *340–42.

considered whether ex-employees of a construction company had violated the DTSA when they breached their employment contracts by forwarding confidential information to their personal email addresses after they had each tendered their resignation to the company.[129] The court concluded the plaintiff had submitted sufficient evidence that defendants obtained the trade secrets through improper means under the DTSA.[130] Specifically, the court pointed to the defendants' employment contracts and confidentiality agreements which imposed a duty to maintain secrecy and delete any confidential files on their personal computers after the end of their employment.[131] The *Intertek Testing Services LLC* court held that the conduct violated the DTSA because the statute defined improper means[132] "to include breach of a duty to maintain secrecy."[133] Therefore, trade secrets were acquired through improper means because the defendant was bound by a confidentiality agreement and breached that agreement.[134]

In 2021, in *Mason*, the Second Circuit affirmed a New York district court's dismissal of a plaintiff's' DTSA claim because he failed to properly allege misappropriation.[135] In *Mason*, the court evaluated a plaintiff's claim against a former employer for misappropriating trade secrets under the DTSA.[136] Plaintiff was a senior vice president of defendant and was the creator of a special pricing model used by the defendant for its insurance business.[137] The court affirmed the district court's order to dismiss the plaintiff's DTSA claims because the plaintiff did not meet the elemental requirement to take reasonable measures to protect his trade secrets and information.[138] The court pointed to plaintiff's failure to require defendant to sign a nondisclosure agreement[139]

[129] *Id.* at *310–25.
[130] *Id.* at *332–33;18 U.S.C. § 1839(6)(A).
[131] *Id.* at *342. Defendants were subject to agreements which bound them to "Maintain[ing] secrecy; erasing the information on their company laptops before returning them to plaintiff; commencing employment with plaintiff's competitor shortly after leaving their employment with plaintiff; and using the trade secrets and confidential information for purposes unrelated to their employment at Intertek, without plaintiff's consent." *Id.*
[132] 18 U.S.C. § 1839(6)(A).
[133] *Intertek Testing Servs., N.A., Inc.*, 2020 WL 1129773, at *342.
[134] *Id.* ("[P]laintiff proffered sufficient evidence to show that defendants obtained its trade secrets and information through "improper means[,]" which specifically includes, inter alia, 'breach of a duty to maintain secrecy.'").
[135] Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x 447 (2d Cir. 2021).
[136] *Id.*
[137] *Id.* at 448–49.
[138] *Id.* at 450.
[139] *Id.*

or to require an agreement that the defendant's use of plaintiff's pricing model was conditioned on his employment with the defendant.[140] Thus, the court held that Amtrust did not misappropriate plaintiff's trade secrets under the DTSA because there was no agreement as to the information's confidentiality.[141]

Both *Mason* and *Intertek* demonstrate the importance of considering the record when making determinations about the validity of a misappropriation claim.[142] Both cases provided this court with analogous rulings[143] that confidentiality agreements serve as a basis for determining whether trade secrets have been misappropriated as a matter of law.[144] Unlike the employer in *Mason*, which did not agree to confidentiality of the pricing model in dispute, Nagel agreed to confidentiality in his employment agreement.[145] Specifically, Nagel agreed that he would not "disclose, use for [him]self or others, make unauthorized copies of, alter or modify in any way, or take with [him] such Proprietary Information."[146]

Like Nagel, *Intertek* defendants were long time employees[147] who violated their employment contracts by sending confidential information to personal email addresses.[148] The

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[140] *Id*.
[141] *Id*.
[142] *Compare id*. at 448–49 (holding that the failure of the plaintiff to legally protect his secrets eliminated a claim for improper acquisition of those secrets.), *with* Intertek Testing Servs., N.A., Inc. v. Pennisi, No. 19-CV-7103, 2020 WL 1129773, at *342 (E.D.N.Y. Mar. 9, 2020) (holding that the defendant's breach of a confidentiality agreement was sufficient evidence to support an improper acquisition DTSA claim alone).
[143] *Mason* is a summary order of the Second Circuit and does not carry precedential value. *Mason*, 848 F. App'x 447 (2d Cir. 2021). *Intertek Testing Servs.* is not binding authority on the Southern district, but is persuasive precedent the court should have considered given the similarities between the cases. *Compare Intertek Testing Servs. N.A. Inc.*, 2020 WL 1129773, at *342 (E.D.N.Y. Mar. 9, 2020) (determining whether a confidentiality agreement was sufficient evidence to support an improper acquisition DTSA claim alone), *with* Zurich Am. Life Ins. Co., v. Nagle, 538 F. Supp. 396 (S.D.N.Y 2021) (analyzing whether a former employee, bound by a confidentiality a greement, who transferred of confidential company information misappropriated trade secrets under the DTSA).
[144] *Id*. at 448–49 (holding that the failure of the plaintiff to legally protect his secrets eliminated a claim for improper acquisition of those secrets.); Intertek Testing Servs., N.A., Inc. v. Pennisi, No. 19-CV-7103, 2020 WL 1129773, at *340–42 (E.D.N.Y. Mar. 9, 2020) (concluding that evidence of a breach of a confidentiality agreement was evidence of misappropriation of trade secrets).
[145] *Compare*, *Mason*, 848 F. App'x. at 450 (noting that the plaintiff did not protect his proprietary pricing model with any legal agreements or licensing), *with* Complaint, *supra* note 30, at 17 (forbidding Nagel from making copies of any of the confidential information he had access to).
[146] Complaint, *supra* note 30, at 17.
[147] *Intertek Testing Servs., N.A., Inc.*, 2020 WL 1129773, at *310–18. One defendant began working for Intertek in 1983 and tendered his resignation in 2019. *Id*.
[148] *Compare* Complaint, supra note 30, at 5, *with* Plaintiff's Exhibit A, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396, 399 (S.D.N.Y. 2021) (forbidding Nagel from making copies of confidential materials), *with* Intertek

Intertek court relied upon the statutory text when it determined the validity of the DTSA claims.[149] Improper means, as stated in *Intertek*, includes theft and a breach of a duty to maintain secrecy.[150] Nagel's conduct was improper because he violated his Agreement and therefore breached his duty to maintain secrecy.[151] Nagel sent copies of confidential information to his personal email, the equivalent of copying physical documents and transporting them to his home.[152]

The Southern District gave no weight to Nagel's employment agreement with Zurich and failed to provide any analysis of the DTSA to explain why Nagel's conduct did not amount to acquiring the information by "improper means."[153] The court erred by failing to consider persuasive precedent from *Intertek* and *Mason*.[154] Had the court relied on such precedent, it would have considered Nagel's employment agreement with Zurich as evidence that Nagel was forbidden from making copies of confidential information and therefore acquired the trade secrets improperly.[155]

Second, the court erred in applying an unduly restrictive definition of the word "use" in the DTSA when it did not consider leveraging the possession of trade secrets during settlement negotiations as a "use" under the statute.[156] Binding precedent dictates using a broad construction

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Testing Servs., N.A., Inc. v. Pennisi, 2020 WL 1129773, at *342 (concluding that defendants were subject to confidentiality agreements which forbid sending confidential information to a personal email address)..

[149] Intertek Testing Servs., N.A., Inc. v. Pennisi, 2020 WL 1129773, at *342.

[150] *Id.* (citing 18 U.S.C. § 1839(6)(A)).

[151] Nagel's agreement provided that he must not: "disclose, use for [himself] or others, make unauthorized copies of, alter or modify in anyway, or take with [him] such Proprietary Information." Complaint, *supra* note 30, at 5.

[152] *Id.*

[153] Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396, 404–06 (S.D.N.Y. 2021).

[154] *See Intertek Testing Servs., N.A., Inc.*, 2020 WL 1129773, at *342 (holding that evidence of breach of a confidentiality agreement was sufficient to indicate that defendant acquired trade secrets through improper means); Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x 447, 450 (2d Cir. 2021) (holding that plaintiff failed to properly protect his trade secrets via a confidentiality agreement and implying the importance of an agreement when evaluating misappropriation claims under the DTSA).

[155] *Compare Intertek Testing Servs., N.A., Inc.*, 2020 WL 1129773, at *342 (holding that evidence of breach of a confidentiality agreement was sufficient to indicate that defendant acquired trade secrets through improper means), *and* Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x at 450 (holding that plaintiff failed to properly protect his trade secrets via a confidentiality agreement and implying the importance of an agreement when evaluating misappropriation claims under the DTSA), *with Zurich Am. Life Ins. Co.*, 538 F. Supp. 3d at 405 ("If Zurich means to argue that Nagel improperly "used" trade secrets by emailing documents to himself, that argument does not plausibly state a claim.").

[156] *Compare* Smith v. United States, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."), *with Zurich Am. Life Ins. Co.*, 538 F. Supp. 3d 396, 404–06 (holding that leveraging possession of trade secrets does not constitute a use)..

of a word to give it its plain meaning.[157] Terms that are not defined at statute should be construed in line with their plain meaning and remain consistent with their construction in other statutes of the same kind.[158]

The plain meaning rule was famously applied in *Smith v. United States*,[159] in 1993, by the United States Supreme Court when it considered the term "use" under 18 U.S.C.§ 924(c)(1), which applied special penalties to any defendant who "during and in relation to any crime of violence or drug trafficking crime[,] uses or carries a firearm."[160] The Court analogized the defendant's "use" of a gun to the "use" of a cane during the famous "caning" of Senator Sumner in 1856.[161] The Court determined that when a statute's purpose is best captured with the ordinary meaning of a term, the ordinary meaning should apply.[162] The Court concluded that the intention of the statute was to prevent violence arising when guns are included in drug trafficking schemes and that that purpose was best furthered by applying a broad construction of the word "use".[163]

The Supreme Court again applied the plain meaning rule when it was asked to interpret the word "disability" under the Americans with Disabilities Act in *Bragdon v. Abbot* in 1998.[164] In *Bragdon*, the Court applied plain meaning to the word "disability" to construe to include patients infected with HIV and thereby prohibited discrimination on that basis.[165] The Court relied upon a body of uniform administrative and judicial decisions holding that HIV fit within the definition of "disability" under the Act.[166] The *Bragdon* Court's holding rested in part on the significance of

[157] *Zurich Am. Life Ins. Co.*, 538 F. Supp. 3d at 403–06.
[158] *See Smith*, 508 U.S. at 228 ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."); *see also* Oakwood Lab'ys LLC v. Thanoo, 999 F.3d 892, 910 (3d Cir. 2021) ("In accordance with its ordinary meaning and within the context of the DTSA, the "use" of a trade secret encompasses all the ways one can take advantage of trade secret information to obtain an economic benefit, competitive advantage, or other commercial value, or to accomplish a similar exploitative purpose...").
[159] *Smith*, 508 U.S. 223 (1993).
[160] *Id.* at 227.
[161] *Id.* at 230–31.
[162] *Id.* at 238–41.
[163] *Id.* at 240.
[164] Bragdon v. Abbott, 524 U.S. 624, 645 (1998).
[165] *Bragdon*, 524 U.S. at 645 ("[T]he legislative record indicates that Congress intended to ratify HUD's interpretation when it reiterated the same definition in the ADA.").
[166] *Id.* ("The uniform body of administrative and judicial precedent confirms the conclusion we reach today as the most faithful way to effect the congressional design.").

maintaining uniform construction of the term to promote consistency.[167] *Smith* and *Bragdon*, taken together, instruct lower courts to consider both the judicial landscape[168] and the congressional record[169] to afford the statute both its intended purpose and a consistent interpretation throughout the courts.[170]

While the Second Circuit has yet to officially define "use" within the DTSA, other jurisdictions have applied the plain meaning rule to the Act.[171] In 2017, in *Oakwood Laboratories LLC v. Thanoo*, the Third Circuit reversed a New Jersey district court's erroneous dismissal of plaintiff's trade secret claim.[172] The case was filed in response to an ex-employee's possession of confidential and proprietary information while working for a competitor.[173] Plaintiff Oakwood Laboratories LLC ("Oakwood") hired defendant Dr. Thanoo as its senior scientist.[174] As Oakwood's senior scientist, Thanoo directly designed the trade secrets[175] that were the basis of the litigation itself.[176] The district court, however, dismissed Oakwood's DTSA claims, holding that Oakwood failed to allege that the trade secrets were actually "used."[177] On appeal, the Third Circuit rejected the district court's interpretation of the word "use" for three reasons: 1) it was contrary to the ordinary meaning of the word; 2) it was contrary to the text of the DTSA; and 3) it was "contrary to the broad meaning that courts have attributed to the term 'use' under the state laws that address trade secret misappropriation."[178] The court pointed to the construction of "use" within

[167] *Id.* ("We find the uniformity of the ... judicial precedent construing the definition significant.").
[168] *Id.* at 631, 645 (noting that no court or agency had construed the meaning of disability within the Rehabilitation Act as not inclusive of HIV, and that Congress had all but taken the definition of disability verbatim from the Rehabilitation Act).
[169] *Id.* at 645 ("All indications are that Congress was well aware of the position taken by OLC when enacting the ADA and intended to give that position its active endorsement.").
[170] *Id.* ("We find the uniformity of the ... judicial precedent construing the definition significant.").
[171] *See* Oakwood Lab'ys LLC v. Thanoo, 999 F.3d 892 (3d Cir. 2021) (applying the plain meaning of "use").
[172] *Id.*
[173] *Id.* at 896–898.
[174] *Id.* at 896.
[175] *Id.*
[176] *Id.* at 897–898. Thanoo went on to work with direct competitor and previous potential venture partner, Aurobindo. *Id.* Aurobindo hired Thanoo in April 2014, and "[w]ithin months" of hiring Thanoo, Aurobindo formed their own group based in the US with the specific purpose of developing microsphere technology. *Id.*
[177] *Id.* at 908 (defining use as to employ for the accomplishment of a purpose or to benefit from).
[178] *Id.* The district court defined use of trade secrets only to mean their replication. *Id.* The Third Circuit criticized this narrow definition because it restricted a defendant's actions to those only involving creating something with the information. *Id.*

the UTSA, a model act adopted by the Commission on Uniform State Laws,[179] and which over forty-eight states[180] have based similar state law provisions.[181]

The Supreme Court's holdings in *Smith* and *Bragdon* dictated the Third Circuit's holding in *Thanoo*, applying a broad construction of the word "use" consistent with its ordinary meaning, the text of the DTSA as enacted by Congress, and the meaning that courts have assigned to similar trade secret laws.[182] Zurich properly alleged that Nagel maintained possession of trade secrets acquired improperly, in violation of his Agreement, and that Nagel used that information as leverage during settlement negotiations with Zurich which caused injury, just as divulging that information to another would have caused.[183] If the court had applied the ordinary meaning of the term "use"[184] to the DTSA, it would have denied Nagel's motion to dismiss Zurich's DTSA claim because Nagel had employed the information for his benefit.[185] Taking possession of trade secrets and using that possession in an attempt to extort Zurich falls squarely within the ordinary meaning of the word "use."[186]

The interpretation of "use" from *Thanoo* supports a similarly broad construction of the term "use" under the DTSA consistent with the plain meaning of the word.[187] By applying a narrow definition of "use" that only includes actions such as relying upon the contents or revealing the

[179] Unif. Trade Secrets Act, 14 U.L.A. (1985); *see* Oakwood Lab'ys LLC v. Thanoo, 999 F.3d at 909 (reasoning that the definitions of misappropriation under the DTSA and the Uniform Trade Secrets Act use the term "use" almost identically).
[180] *Trade Secrets Law*, UNIF. L. COMM'N., https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792 (last visited Nov. 20, 2021).
[181] Congress was aware of the UTSA and its progeny when it enacted the DTSA. Oakwood Lab'ys LLC v. Thanoo, 999 F.3d at 909; H.R. Rep. No. 114–529 at 199 (2016).
[182] *See* Smith v. United States, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."); Oakwood Lab'ys LLC v. Thanoo, 999 F.3d at 909 ("Numerous cases, pre-dating the DTSA, demonstrate that understanding of the term [use].").
[183] Complaint, *supra* note 30, at 7.
[184] *Use*, Black's Law Dictionary (11th ed. 2019).
[185] Complaint, *supra* note 30, at 6–7; Plaintiffs' Brief, supra note 37, at 4.
[186] *Compare use*, Black's Law Dictionary (11th ed. 2019), *with* Zurich Am. Life. Ins. Co., v. Nagle, 538 F. Supp. 3d 396, 405 (holding that one does not misappropriate trade secrets for the purpose of the DTSA when one "uses possession of the trade secret to extort the trade secret's owner, without disclosing," relying upon, or opening the contents of the secrets).
[187] Oakwood Lab'ys LLC v. Thanoo, 999 F.3d 892 (3d Cir. 2021).

information, the Southern District obstructed the intended purpose and effects of the DTSA[188] and failed to adhere to the Supreme Court's clear precedent instructing lower courts to construe statutory terms in line with their plain meaning when they have not been defined at statute.[189] Defining "use" in line with its plain meaning achieves judicial uniformity, and the statutory purpose will not be frustrated.[190] The DTSA was enacted to protect Americans against all injuries that trade secret owners face when they lose exclusive ownership of their information.[191]

In conclusion, the Southern District erred when it failed to properly assess Zurich's claim of misappropriation under the DTSA by not considering persuasive precedent dictating that violation of confidentiality agreements is evidence of acquiring trade secrets through improper means under the DTSA and by construing the term "use" narrowly.[192]

The DTSA was enacted by Congress in 2016 to protect innovators against theft of their most trusted assets, their efforts and their productivity—their trade secrets.[193] The Southern District's decision effectively denies relief to thousands of potential plaintiffs by applying the DTSA narrowly and excluding a host of other injurious conduct.[194] By failing to apply the DTSA broadly, the Southern District failed to protect one of the most foundational rights of modern American society—private property.[195]

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[188] S. Rep. No. 114-220, at 2 (2016). Congress enacted the DTSA to combat the economic threat that trade secret theft posed the United States economy in 2016. *Id*.
[189] *See* Smith v. United States, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."); Bragdon v. Abbott, 524 U.S. 624, 645 (1998) ("[T]he new statute should be construed in light of this unwavering line of administrative and judicial interpretation."); Oakwood Lab'ys LLC v. Thanoo, 999 F.3d 892 (3d Cir. 2021) (holding that the term "use" should be construed plainly because in the context of trade secrets, numerous other courts have defined it broadly).
[190] *Id*.
[191] Remarks on Signing the Defend Trade Secrets Act 2016, Daily Comp. Pres. Doc. 309 (May 11, 2016).
[192] *Compare* Zurich Am. Life Ins. Co. v. Nagel, No. 20-CV-11091(JSR), 2021 WL 1877364 (S.D.N.Y. May 11, 2021), *with* Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x 447, 450 (2d Cir. 2021) (holding that when a plaintiff does not protect their secrets with a duty to maintain secrecy, there is no plausible misappropriation), *and* Intertek Testing Servs., N.A., Inc. v. Pennisi, No. 19-CV-7103, 2020 WL 1129773, at *340–42 (E.D.N.Y. Mar. 9, 2020) (holding that evidence of a breach of a confidentiality agreement was evidence of misappropriation of trade secrets).
[193] Remarks on Signing the Defend Trade Secrets Act 2016, Daily Comp. Pres. Doc. 309 (May 11, 2016).
[194] *See Zurich Am. Life. Ins. Co.*, 538 F. Supp. 3d at 403–06 (holding that Nagel's conduct did not constitute a "use" under the DTSA because Nagel did not rely on the contents or disclosure trade secrets); Smith v. United States, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.").
[195] *See* Jefferson, *supra* note 3 ("The true foundation of republican government is the equal right of every citizen, in his person and property, and in their management.").

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Writing Sample II

Attached are the sections (factual summary, argument, conclusion) of an appellate brief that I submitted for consideration in the Dean Jerome Prince Memorial Moot Court Competition. The fact pattern instructed competitors to argue on behalf of either Petitioner or Respondent, on the issues of (1) whether the Petitioner's Sixth Amendment right to counsel attached prior to his recorded conversation with an undercover FBI agent; and (2) whether the district court properly excluded testimony taken at a grand jury proceeding pursuant to rules 802 and 804(b)(1) of the Federal Rules of Evidence.

This brief was submitted on behalf of Respondent, The United States of America, in which I argued that the right to counsel attaches only in the five instances delineated by the Supreme Court in *Kirby v. Illinois*. Next, I argued that the grand jury testimony was properly excluded hearsay because the Government lacked the requisite motive pursuant to Rule 804(b)(1).

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STATEMENT OF THE CASE

I. FACTUAL SUMMARY

In September 2020, the Government received a tip from the Internal Revenue Service ("IRS") that Thomas Collins ("Defendant") was potentially operating an illegal business from his legally operated restaurant and bar, Hoyt's Tavern. R. at 43–44. Over the next several months, the Government began its investigation of the Defendant and Hoyt's Tavern. R. at 44–45. The initial period of this investigation revealed that Roxanne Roulette ("Roxy Roulette"), a longtime friend and neighbor of the Defendant, had rented the basement of Hoyt's Tavern where she and the Defendant ran an illegal sports gambling operation. R. at 44. The Defendant then laundered the proceeds of the gambling operation through Gourmet Grocers, a supposed "vendor" of the restaurant. R. at 44. That company then made payments to the Defendant and his associates including Roxy Roulette. R. at 44–45. While during 2020 the Government had pieced together a credible story, it lacked sufficient evidence to prosecute the Defendant.

In December 2021, the Government was notified that an associate of the Defendant, Pavel Hoag-Fordjour, was in Boerem. R. at 45. Later, on January 5, 2021, the Government stopped Mr. Hoag-Fordjour before leaving the jurisdiction to serve him with a material witness warrant pursuant to 18 U.S.C. § 3144. R. at 45. The Government deposed Mr. Hoag-Fordjour and held him in custody before he was later released and retreated to Brooklania—a country with which the United States lacks an extradition agreement. R. at 45–46. Soon after, numerous other associates of the Defendant began returning to Brooklania, foreclosing several avenues of investigation, and accelerating the Government's investigation of the Defendant. R. at 45.

To that end, the Government mailed the Defendant target letters notifying him of the investigation of him and his business. R. at 45. On January 25, 2021, the Government arrested Roxy Roulette to prevent her from fleeing the jurisdiction to Brooklania. R. at 44–46. Despite the Government's objections, Roulette was released on bail and thereafter returned to Brooklania. R. at 46.

On January 26, 2021, the Government spoke with the Defendant about the ongoing FBI investigation when Special Agents Sayed and Simonson visited him at home. R. at 6. The Defendant subsequently consented to a cursory search of his apartment by the agents. R. at 6. The agents visually inspected each of the rooms in the Defendant's apartment. Special Agent Sayed observed a key fob bearing the same logo as the Defendant's apartment complex on the top of a dresser in one of the bedrooms. R. at 6. When Special Agent Sayed asked the Defendant if the keys were for a storage unit, the Defendant told the agents that the keys were used for a storage unit at a vacation home located in Colorado. R. at 6. Special Agent Sayed informed the Defendant that he would hold on to the keys and the Defendant acquiesced. R. at 7. Special Agent Simonson urged the Defendant to cooperate with the Government's investigation of other suspects. R. at 6–7. Simonson was unsuccessful. R. at 7. Special Agent Sayed then brought the keys to the lobby where he inquired about a storage facility. R. at 7. Special Agent Sayed was taken to the storage room where he observed a series of storage lockers. R. at 7. After noticing a storage locker poorly camouflaged with newspaper, Special Agent Sayed inserted the key without opening the door, confirming the locker corresponded with the Defendant's key. R. at 7.

Later that day, feeling confident after his interaction with the Defendant and identification of the Defendant's storage unit, Special Agent Simonson suggested obtaining an arrest warrant for the Defendant by leaving a post-it note for Special Agent Sayed. R. at 8. However, the Government held off in favor of investigating the Defendant while undercover to ensure that the investigation resulted in the arrest of the correct individual. R. The Government's continued investigation of the Defendant was in search of direct evidence to bolster the circumstantial evidence obtained until that point in the investigation.

The agents subsequently obtained a search warrant that was executed on the morning of January 27, 2021, for the Defendant's residence, including his storage locker. R. at 56. The Government's search revealed a thumb drive containing records of the gambling operation and $2.5 million stored in a duffle bag. R. at 56. Later that day, in furtherance of their investigation,

the Government sent Special Agent Ronald Ristroph, wearing an electronic listening device, to Hoyt's Tavern to speak with the Defendant. R. at 15. Special Agent Ristroph—under the pseudonym of Brett Thompson—represented that he was an associate of Roxy Roulette and engaged the Defendant in a brief conversation about the restaurant and its relationship with Gourmet Grocers. R. at 16.

On February 22, 2021, an employee of the Defendant, Lucy Washington, gave her testimony before a federal grand jury empaneled in the Eastern District of Boerum. R. at 21. Ms. Washington appeared without immunity, exposing her to criminal prosecution for any self-incriminating statements. R. at 22. During direct examination, Ms. Washington described her employment for the Defendant as a bartender at Hoyt's Tavern as well as her involvement in the aforementioned gambling operation. R. at 22–27. Ms. Washington insisted that the Defendant had no knowledge of any crimes taking place in the tavern, despite her employment for the Defendant in the same location where the gambling ring was taking place and the Defendant's longtime relationship with Roxy Roulette. R. at 22–27. When asked if she was aware that lying to a grand jury constituted perjury, Ms. Washington volunteered that she "did not know it was a crime," but stated that her testimony was truthful. R. at 27.

Despite Ms. Washington's spirited testimony, the grand jury returned an indictment charging the Defendant with one count of Illegal Gambling in violation of 18 U.S.C. § 1955 and Boerum Penal Code § 68.01 and one count of Laundering of Monetary Instruments ("Money Laundering") in violation of 18 U.S.C. § 1956. R. at 1–2.

Lucy Washington was tragically killed in a bicycle accident on June 21, 2021. R. at 10. Therefore, neither the Government nor the Defendant was able to call Ms. Washington to testify at the trial which took place in September of the same year. R. at 42.

ARGUMENT

II. DEFENDANT'S CONVERSATION WITH UNDERCOVER SPECIAL AGENT RISTROPH IS ADMISSIBLE EVIDENCE BECAUSE DEFENDANT'S RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT IS ONLY TRIGGERED ONCE FORMAL CRIMINAL PROSECUTION IS INITIATED AGAINST THE DEFENDANT.

This Court should affirm the decision of the Fourteenth Circuit holding that the Defendant's Sixth Amendment right to counsel did not attach when he spoke with Special Agent Ristroph at Hoyt's Tavern; therefore, Defendant's statements were admissible at trial. The Sixth Amendment guarantees criminal defendants the right to counsel against charges brought by federal and state law enforcement. *See Powell v. Alabama*, 287 U.S. 45, 71 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963). The right to counsel for the accused can be traced to the English common law tradition of affording defendants accused of misdemeanor crimes counsel to argue the law on their behalf at trial. In *Kirby v. Illinois*, the Court has made clear that the Sixth Amendment is only triggered upon the formal initiation of criminal proceedings and has never found mere police investigation sufficient. 406 U.S. 682 (1972) (declining to include routine police investigation such as a line-up that occurs prior to the indictment as an instance that triggers the Sixth Amendment protections); *Moran v. Burbine*, 475 U.S. 412 (1986) (holding that the Sixth Amendment is not triggered by police investigation). The Sixth Amendment does not guarantee the right to legal advice nor has this Court ever insinuated that it should.

Despite this Court's consistent interpretation and refusal to dilute the purpose and text of the Sixth Amendment, the Third and Seventh Circuits continue to stretch the right to counsel beyond its purpose and text. *See Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999) (holding that the defendant's right to counsel attached prior to his indictment when he was "confronted with the organized resources of an ongoing police investigation."); *United States ex rel. Hall v. Lane*, 804 F.2d 79 (7th Cit. 1986). The Second and Sixth Circuits have adopted the bright line rule under *Kirby* and have held that the right to counsel under the Sixth Amendment is only triggered upon the initiation of one of the five events described by the Court in *Kirby*. *See*

United States v. Moody 206 F.3d 609 (6th Cir. 2000), *cert denied*, 531 U.S. 925 (2000); *United States v. Mapp*, 170 F.3d 328, 333–34 (2d Cir. 1999) (holding that recorded conversations that take place while in police custody for a different criminal transaction did not trigger Sixth Amendment right to counsel).

Here, the Court should apply the bright line rule established in *Kirby* and applied by the Second and Sixth Circuits. Those Circuits acknowledge that the Court has spoken as to the moment the Sixth Amendment right to counsel attaches. The list produced by the *Kirby* Court was not a mere example; but rather, a definite list of the five events in criminal procedure which bring the defendant eye-to-eye with the power of the State. The Sixth Amendment is not an ever-expandable shield for defendants to evade law enforcement. The bright line established in *Kirby* should be upheld to prevent the distortion of the Constitution's promises beyond recognition.

A. Recorded Conversations Between the Government and the Defendant are Admissible if the Communication Took Place Prior to the Initiation of Formal Criminal Proceedings.

Recorded conversations with undercover law enforcement that take place prior to the Government's initiation of a formal prosecution of the Defendant do not trigger the Sixth Amendment right to counsel. *Kirby*, 406 U.S. 682; *Moody*, 206 F.3d 609 (holding that pre-indictment plea negotiations do not trigger the Sixth Amendment right to counsel because the critical states of criminal proceedings begin "only after the initiation of formal judicial proceedings."). The Court has also been clear that government actions that are argued to have the effect of "sealing the defendant's fate," such as confessions to police for crimes not yet charged, do not trigger the Sixth Amendment. *See Moody*, 206 F.3d 609 (citing *Moran v. Burbine*, 475 U.S. 412, 430 (1986)).

In *Kirby*, this Court forged a clear path through its precedents that attempted to define the moment of attachment and declared that a defendant's right to the assistance of counsel attaches after the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." 406 U.S. 682, 689 (1972) ("It is

then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."). The *Kirby* Court concluded that formal charges, information, and arraignments all rise to the level of "adversary judicial criminal proceedings" because through those actions the defendant is actually "faced with the prosecutorial forces of organized society…" and the positions of the parties become "solidified." *Id.*; *see United States v. Gouveia*, 467 U.S. 180, 189 (1984). *Kirby* established a bright line rule for determining when the Sixth Amendment right to counsel attaches has since been applied in subsequent cases by this Court. *See Moran*, 475 U.S. 412. Rather than thrusting a fact-intensive inquiry upon the lower courts, this Court should affirm the *Kirby* Court's holding that the Sixth Amendment right to counsel is triggered only when the defendant becomes the accused by way of formal criminal proceedings.

The Second and Sixth Circuits make clear that the threshold question of whether the Sixth Amendment is triggered is not whether the Defendant's proof of guilt is at stake, but rather, whether the Government's action cause a confrontation between the Defendant and a concentration of prosecutorial resources and intricacies of criminal procedure. *Compare United States v. Moody* 206 F.3d 609 (6th Cir. 2000), *cert denied*, 531 U.S. 925 (2000), *and United States v. Mapp*, 170 F.3d 328 (2d Cir. 1999), *with Kirby v. Illinois* 406 U.S. 682 (1972).

In *United States v. Mapp*, the Second Circuit Court of Appeals held that the defendant's right to counsel under the Sixth Amendment was not triggered when, six months prior to his indictment for the crime at issue, he was brought to the Eastern District of New York for fingerprinting and intentionally placed in a holding cell with a cooperating witness who was wearing an electronic listening device. 170 F.3d 328, 333–34 (2d Cir. 1999). The Court of Appeals reasoned that absent the formal initiation of prosecution for the crime at issue, the recorded conversation between the defendant and the cooperating witness was admissible evidence. *Id.* at 334.

The Government's actions did not trigger the Defendant's Sixth Amendment right to counsel because it did not initiate formal criminal proceedings against the Defendant when Special Agent

Ristroph spoke with him in Hoyt's Tavern. The Government was engaged in the preliminary investigation of the Defendant and had not sought or received an indictment, formal charge, information, or arraignment of the Defendant. *See Kirby*, 405 U.S. 689 (holding that the Sixth Amendment right to counsel is only triggered upon the initiation of formal criminal proceedings which include indictment, formal charge, information, or arraignment). Rather, the Government gathered evidence during the exchange with Defendant that was used to determine whether or not to formally prosecute the Defendant.

The Defendant was not faced with the requisite "prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural criminal law" because the Government's position was not definitively adverse. *Kirby*, 406 U.S. 689. The Government's method of questioning or subjective motivation for questioning the Defendant is immaterial to this Court's inquiry. The record is unambiguous that the Defendant was indicted and formally charged after his conversation with Special Agent Ristroph. Therefore, this Court should affirm the decision of the Fourteenth Circuit and this Court's decision in *Kirby*.

B. The Third and Seventh Circuit's Fact-Intensive Inquiry Departs from Established Precedent and Thwarts the Text and Purpose of the Sixth Amendment Right to Counsel.

The only controlling authority before this Court is *Kirby* and its progeny. The *Kirby* Court rejected the defendant's invitation to carve out a per se exclusionary rule for testimony given during an identification prior to his indictment, underscoring the importance of initiating criminal proceedings. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). The Third and Seventh Circuit's version of *Kirby* turns the Court's holding on its head—mistaking the *Kirby* Court's conclusion that upon "formal charge, preliminary hearing, indictment, information, and arraignment" the defendant "faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural criminal law" to mean that whenever the defendant is faced with prosecutorial forces, he is entitled the right to counsel under the Sixth Amendment. *Compare Id.* at 689, *with United States ex rel. Hall v. Lane*, 804 F.2d 79 (7th Cir. 1986), *and Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999). This resolution of the Amendment is

repugnant to the text of the Constitution itself and contradicts the only controlling precedent before this Court. *Compare Kirby*, 406 U.S. at 689, *with Matteo*, 171 F.3d 877. The requirement that the defendant is merely faced with prosecutorial forces or criminal procedure transforms the function of the Sixth Amendment from a right to counsel to create a defense to a right to counsel for legal advice.

The right to counsel standard enunciated by this Court is grounded in both the text and purpose of the Sixth Amendment. The *Gouveia* Court concluded that the words "criminal prosecution" and "accused" as they appear in the Sixth Amendment, and the purpose of the right to counsel which is "assure aid at trial 'where the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" 467 U.S. 180, 189 (1984) (quoting *United States v. Ash*, 413 U.S. 300, 309 (1973)).

The text of the Sixth Amendment makes it explicit that the right to counsel is not without limitation. *See* U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right…to have the assistance of counsel for his defense."). The Third and Seventh Circuits expand the right to counsel beyond the clear limits of the text by finding attachment prior to the initiation of formal criminal proceedings and before the position of the prosecution becomes firm. *See United States ex rel. Hall v. Lane*, 804 F.2d 79 (7th Cir. 1986); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999) (finding that the defendant's right to counsel attached prior to this indictment but after a preliminary arraignment). The Sixth Amendment was enacted to serve as a sword for the accused who stood to lose their life or liberty and not to provide counsel to those who are subject to investigation.

i. A bright line rule preserves judicial resources and does not invade the accused's constitutional right to counsel to put on a defense when confronted by actual criminal proceedings.

The Court's bright line rule effectuates clear judicial decision-making and eliminates the need for an ad hoc determination of each defendant's particular circumstances to determine

whether his Sixth Amendment right to counsel was triggered or not. *See United States v. Gouveia*, 467 U.S. 180, 193 (1984) (holding that the Court has "foreclosed the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceeding."); *see also United States v. Moody*, 206 F.3d 609 (6th Cir. 2000), *cert denied*, 531 U.S. 925 (2000) ("The Supreme Court and this Circuit have reduced the right to counsel to a bright line test; the Supreme Court has identified with particularity the states of a criminal proceeding which are 'critical' and thus implicate the right to counsel."). The result contemplated by the Third and Seventh Circuits asks the judiciary to closely examine the organization and resources that law enforcement relies on to investigate potential suspects. This will crowd overburdened lower courts who will be asked to make case-by-case determinations about the defendant's Sixth Amendment rights at any point during the government's investigation. This is a sharp departure from the current standard which requires determining if one of the five specified milestones has occurred and has the potential to chill legitimate police work when it is unclear if a sufficient amount of resources have been expended on a suspect. Absent objective criteria, judges will remain unclear about applying Sixth Amendment doctrine.

The bright line rule established in *Kirby* states that the right to counsel attaches at the moment when the government actually initiates formal criminal proceedings against the defendant which requires an attorney to explain the legal issues before him. In *Gouveia*, the Court held that when the government obtains an indictment, formal charge, information, or arraignment of or against the defendant, "the government has committed itself to prosecute, and only then that the adverse positions of the government and defendant have solidified." 467 U.S. 180, 189 (1984).

Kirby reflects the importance of drawing a sharp line between police investigation and prosecution. The standard does not engage in a fact-intensive review of the federal or state investigation but rather asks if the Government has solidified its position as adverse to the defendant.

C. Even if this Court Should Find that the Third Circuit's Alteration of Kirby is the Appropriate Standard, this Court Should Still Find that the Government's Actions Do Not Meet the Circuit's Fact Intensive Inquiry because the Government was Still Engaged in an Investigation.

If this Court should find the Third Circuit's version of the *Kirby* rule persuasive, this Court should still find that defendant's conversation with Special Agent Ristroph did not constitute the moment in time in which the defendant found "himself faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural criminal law" *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999).

Under the Third Circuit's version of *Kirby*, the right to counsel may attach during a police investigation when the government is aware that the defendant is represented. *See Id.* at 893. In *Matteo*, the Third Circuit held that the defendant's right to counsel attached when he had two recorded telephone conversations with government agents. *Id.* at 892. At the time of the defendant's recorded conversation with law enforcement, the government had arrested and incarcerated the defendant for over a week and had been subject to a preliminary arraignment. *Id.* at 892–93. Importantly, law enforcement was aware that the defendant had retained counsel. *Id.* at 893. The Third Circuit concluded that under those particular circumstances, the defendant was "confronted with the organized resources of an ongoing police investigation by agents who were well aware of his legal representation." *Id.* The court reasoned that the defendant's right to counsel attached while the police investigation was ongoing. *Id.*

While the Government does not advocate for a fact-sensitive review as required of the Third Circuit's departure from *Kirby*, the facts are easily distinguished. Unlike Matteo, the Defendant was not in police custody and had not been subject to any formal arraignment proceedings. The Defendant was not represented by counsel, nor was the Government aware that Defendant had retained counsel. Further, unlike the law enforcement officers in *Matteo*, the Government had not involved prosecutor's in the FBI investigation of the Defendant and was still in the process of gathering evidence. The recorded conversation between the Defendant and Special Agent Ristroph was used to obtain information to confirm the Defendant's knowledge of and participation in the

illegal gambling operation. Ristroph's conversation was pointed at obtaining direct evidence of the crime, as opposed to the circumstantial evidence obtained otherwise.

Even if the defendant's right to counsel was triggered prior to the recorded conversation with Special Agent Ristroph, this Court should uphold the decision of the Fourteenth Circuit because the Government's conduct is not violative of the Sixth Amendment. The Government violates the defendant's Sixth Amendment rights when it intentionally elicits incriminating statements from the defendant once the defendant's right to counsel has attached. *See Maine v. Moulton*, 474 U.S. 159 (1985). The court concluded that the officer's technique of representing that he had forgotten details and asking the defendant to "refresh his memory" constituted inducing incriminating statements from the defendant. *See Moulton*, 474 U.S. 159.

Special Agent Ristroph's question technique departs from other case law which found that the law enforcement agent was intentionally inducing incriminating statements. The Government did not intentionally elicit incriminating statements. Special Agent Ristroph instead represented that he was an associate of Roxy Roulette and that his call with other associates had been "cut short."

III. LUCY WASHINGTON'S GRAND JURY TESTIMONY IS INADMISSIBLE HEARSAY UNDER FEDERAL RULE OF EVIDENCE 802 AND IS NOT SUBJECT TO THE UNAVAILABLE WITNESS EXCEPTION UNDER RULE 804(B)(1).

This Court should affirm the decision of the Court of Appeals for the Fourteenth Circuit holding that Lucy Washington's Grandy Jury testimony is inadmissible hearsay under Federal Rule of Evidence 802 ("Rule 802") which is not subject to the unavailable[1] witness exception under Rule 804(b)(1) ("Rule 804(b)(1)"). Former testimony of an unavailable witness is admissible at trial if the party against whom the evidence is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." FED. R. EVID. 804(b)(1); *see also* FED. R. EVID. 802. In *United States v. Salerno*, this Court held that Rule 804(b)(1) requires proof that the Government had a "similar motive" when the former testimony was elicited. 505

[1] The parties agree that Ms. Washington was unavailable as a witness at the time of trial due to her tragic death on June 21, 2022. R. at 10; *see* Fed. R. Evid. 804(a)(4).

U.S. 517, 525 (1992) (remanding the case to the Second Circuit Court of Appeals for a determination as to whether the Government had a "similar motive" when taking the disputed Grand jury testimony). This Court was explicit that neither adversarial fairness nor forfeiture of any "privilege" over the testimony by the opposing party by taking a position contradictory to the testimony are sufficient legal grounds to admit former testimony absent a similar motive. *Id.* at 323–25. The Circuits have interpreted the "similar motive" requirement imposed on Rule 804(b)(1) by *Salerno* to mean quite different things.

The division is marked by the D.C. and the Second Circuits. *Compare United States v. Miller*, 904 F.2d 65 (D.C. Cir. 1990) (holding that when the testimony at Grand jury was directed to the "same issue" of the guilt or innocence of the defendant, that the government had the same motive to question as they do at trial), *with United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993) (holding that the government must have a similar intensity to prove the same issue). The D.C. Circuit and Ninth Circuits have interpreted the words "similar intent" of Rule 804(b)(1) and the *Salerno* Court's "similar motive" to result in an incredibly high level of generality. Grand jury testimony of an unavailable witness is admissible, according to these Circuits, if the testimony at Grand jury goes toward the guilt or innocence of the defendant the Government retains a "similar motive." *Miller*, 904 F.2d 65 ("[T]estimony was to be directed to the same issue—guilt or innocence of Morris and Ross.").

Under the D.C. and Ninth Circuit's construction of the "similar motive" requirement of Rule 804(b)(2) renders that requirement meaningless. If the threshold question is simply whether or not Grand jury testimony goes toward the guilt or innocence of the defendant, effectively any testimony given by a witness during a Grand jury who subsequently becomes unavailable becomes admissible. This is certainly not the narrow exception that Congress and this Court have carved out in later, controlling precedent. *Salerno* overruled the *Miller* court's reading of Rule 804(b)(1) and requires reviewing courts to look to whether the party seeking to admit the former testimony

of an unavailable witness has demonstrated that the government had a similar motive during the grand jury. *See Salerno,* 505 U.S. 517, 525 (1992).

The First and Second Circuits, by contrast, provide this Court with a fact-based test for establishing whether or not former Grand jury testimony should be admitted under Rule 804 (b)(1) by analyzing the opportunity and motivations of the government during the former testimony as instructed by this Court. *See United States v. DiNapoli*, 8 F.3d 909, 914 (2d. Cir. 1993) (holding that the party against whom the former Grand jury testimony is offered must have "an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue."); *United States v. Omar*, 104 F.3d 519 (1st Cir. 1997) (holding that if the Government has the opportunity and similar motive to develop the testimony that the testimony may be admissible under Rule 804(b)(1)).

Here, the Court should apply the First and Second Court's application of a fact-based test for establishing whether the Government developed the former testimony with the same motivation. At issue in this case is the former federal Grand jury testimony. Grand jury testimony highlights a critical limit of the former testimony exception under Rule 804(b)(1) because the proceeding is inherently different from a trial. The First and Second Circuits apply a fact-based rule that requires the reviewing court to examine the motive and intensity of the Government when developing the former testimony. *See DiNapoli*, 8 F.3d 909; *Omar*, 104 F.3d 519.

A. The Government's Interest in Establishing the Witness's Direct Testimony Before the Grand jury Lacked the Requisite Intensity or Purpose Examination During Trial to Satisfy the "Similar Motive" Test.

The Government lacked a similar intensity to prove the validity of Lucy Washington's Grand jury testimony. In order to admit former testimony of an unavailable witness under Rule 804(b)(1) and Rule 802 the Government, or the party against whom the evidence is offered, must have had an interest of "a substantially similar intensity to prove the same issue as they do later at trial." *DiNapoli*, 8 F.3d 914. In *United States v. DiNapoli*, the Second Circuit established that to determine whether a "similar motive" exists under *Salerno*, the reviewing court must conduct a

fact-based analysis. 914 (2d Cir. 1993). Under *DiNapoli,* whether or not the Government engages in cross-examination of the witness is immaterial. *Id.* Therefore, the reviewing court must look to the particular circumstances under which the former testimony was taken.

In *DiNapoli,* the Second Circuit concluded that because the grand jury testimony took place after the defendant had been indicted and the grand jury had indicated that they did not believe the testimony of the witness. *Id.* at 915. The court concluded that those circumstances "dispel[ed] similarity of motive, and the absence of similar motive is not rebutted by the limited cross-examination undertaken by the prosecutor at the grand jury." *Id.* Unlike the testimony in *DiNapoli,* the testimony of Lucy Washington was taken prior to the indictment of the Defendant and during the ongoing police investigation. These circumstances, though markedly different from *DiNapoli,* also foreclose a possibility that the Government's motivation during grand jury was the same as it would have been at trial.

Further, the record does not contain any indication that the Government was in possession of any evidence that may have been used to discredit the Ms. Washington's testimony when it was given. The First Circuit Court of Appeals expanded the Court's focus on the motivation of the Government during the former testimony to include the "opportunity" of the Government to question the witness with the same motivation. In *United States v. Omar,* the court evaluated whether the former testimony was given before or after the indictment of the defendant and what other evidence the Government had uncovered by that time to actually undermine the former testimony when it was given. 104 F.3d 519 (1st Cir. 1997). In *Omar,* the government had not discovered direct evidence that would have enabled it to refute the testimony by impeaching the witness's false or misleading statements.

While the Government was able to question the truthfulness of Ms. Washington's testimony, the Government was unable to submit proof to the jury as a means of discrediting all or part of Ms. Washington's testimony. Therefore, the intensity of the Government to prove that Ms. Washington was a truthful witness departed greatly at the grand jury by virtue of the

Prosecutor's inability during the grand jury to impeach a witness absent strong, direct evidence to the contrary. These circumstances, like those in *DiNapoli*, "dispel similarity of motive." *See United States v. DiNapoli*, 8 F.3d 914 (1993).

At the time of Ms. Washington's grand jury testimony, the defendant had not yet been indicted. In addition, the Government lacked the same opportunity under *Omar* to impeach Ms. Washington using the circumstantial evidence that it had uncovered in Defendant's storage locker. It has also not been established whether the Government's investigation of Defendant and Hoyt's Tavern revealed that Defendant was working with Ms. Washington on his illegal business operations prior to the grand jury testimony. Without the same information that the Government would have later during trial, the Government did not have the same opportunity or motivation to examine Ms. Washington or to elicit testimony with the same intensity.

The Government did not possess a similar motive of substantially the same intensity or purpose when it examined Lucy Washington during the grand jury. The Government's examination of Lucy Washington was limited due to the inherent lack of information and evidence during that stage of the investigation. In addition, the Government was operating with a substantially different purpose when it took Ms. Washington's testimony before the grand jury than it would have had in front of the jury at trial. The Government has good reason to preserve certain facts for trial when the Government is tasked with reaching substantially higher burden of proof. Both the Government and the Defendant were unable to call Lucy Washington at trial where the Government's attorneys may have challenged the witness in front of the jury.

i. The occurrence of cross-examination during former testimony does not create a presumption of admissibility because cross-examination alone is insufficient to constitute similar motive of the party against whom the former testimony is now offered.

The occurrence of cross-examination during former testimony does create a presumption of a similar motive. *See United States v. DiNapoli*, 8 F.3d 914, 915 (1993). In *United States v. DiNapoli*, the Second Circuit held that the occurrence of cross-examination did not rebut the absence of a similar motive. *Id.* Rather, the court concluded that "[a] prosecutor may have varied

motives for asking a few challenging questions of a grand jury witness who the prosecutor thinks is lying…the prosecutor might want to afford the witness a chance to embellish the lie, thereby strengthening the case for a subsequent perjury." *Id.* The Government did not engage in full-blown cross-examination of Lucy Washington given the obvious limitation of the grand jury—the Defendant was not present, and the witness appears unrepresented. The Government's attorney asked Ms. Washington if her statements regarding the Defendant's naivete to the ongoing criminal enterprise. Like the prosecutors in *DiNapoli*, the Government has the opportunity during grand jury testimony to preserve a position for trial or preserve perjury on the record for subsequent prosecution of the witness herself.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourteenth Circuit should be affirmed in its entirety.

Respectfully Submitted,

s/o Team 36R

Attorneys for the Respondent

Applicant Details

First Name	**Hayfa**
Last Name	**Ayoubi**
Citizenship Status	**U. S. Citizen**
Email Address	**hayoubi@unc.edu**
Address	**Address** Street **1300 FORDHAM BLVD APT 408** City **CHAPEL HILL** State/Territory **North Carolina** Zip **27514** Country **United States**
Contact Phone Number	**9804284901**

Applicant Education

BA/BS From	**Pennsylvania State University-University Park**
Date of BA/BS	**August 2019**
JD/LLB From	**University of North Carolina School of Law** **https://law.unc.edu/**
Date of JD/LLB	**May 1, 2024**
Class Rank	**I am not ranked**
Law Review/Journal	**Yes**
Journal(s)	**NC Journal of Law & Technology**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Weissman, Deborah
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919.962.3564
Rosellini, Skyler
rosellini@healthlaw.org
Scardulla, Annie
scardull@email.unc.edu
985-320-7797

This applicant has certified that all data entered in this profile and any application documents are true and correct.

1300 Fordham Blvd, Apt 408
Chapel Hill, NC 27514

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year student at the University of North Carolina School of Law and the executive editor of the North Carolina Journal of Law & Technology. I am writing to apply for a 2024-2025 clerkship with your chambers.

After completing Judicial sentencing, a class that explores the sentencing guidelines in North Carolina and the North Carolina Structured Sentencing Act, I developed a deeper understanding of the judge's role in the administration of justice. I especially enjoyed participating in the sentencing workshops during which I discussed different criminal cases with North Carolina judges and learned about their sentencing policies and philosophies. I believe that a clerkship is a great experience to learn more about the judicial process, refine my writing and research skills, and work with experienced judges and lawyers on complex legal issues.

As an aspiring litigator with federal litigation experience, I believe I would be a great addition to your chambers. My work experience reflects my commitment to tackling social justice issues and refining the skills that will make me a great advocate and judicial clerk. This summer, I am interning with the criminal justice advocacy clinic at Yale where I am assisting the team with drafting pleadings and preparing for a *Schlup* evidentiary hearing in the United States District Court for the Middle District of Alabama. In addition to my work experience, I have developed solid legal research and writing skills as a staff member on the North Carolina Journal of Law & Technology. My piece which explores the concept of inventorship in patent law was published in January 2023.

A resume, transcript, and writing sample are enclosed. Please let me know if I can provide any additional information. I can be reached by phone at (980)428-4901 or by email at hayoubi@unc.edu. Thank you for your consideration.

Respectfully,

Hayfa Ayoubi
Candidate for Juris Doctor 2024

HAYFA AYOUBI
1300 Fordham Blvd., Apt. 408, Chapel Hill, NC 27514
(980)428-4901 | hayoubi@unc.edu

EDUCATION

University of North Carolina School of Law, Chapel Hill, North Carolina
Juris Doctor, expected May 2024

- Honors & Activities: Executive Editor, *North Carolina Journal of Law & Technology Vol. 25*
  Kilpatrick Mock Trial Competition, Semifinalist and best advocate
- Publications: Hayfa Ayoubi, *Artificial vs. Natural: Should AI Systems Be Named as Inventors on Patent Applications?,* N.C. J. L. & TECH., Dec. 2022, at 1.
- Pro Bono: Cancer Clinic, Immigration Clinic, Expunction Project, Innocence Project, and Medicaid Appeals Project

Pennsylvania State University, University Park, Pennsylvania
Bachelor of Arts, Dual Degrees: Psychology and Law & Society, August 2019

- Phi Delta Phi (International Legal Honor Society), *Treasurer*

EXPERIENCE

Criminal Justice Advocacy Clinic- Yale Law School, New Haven, CT
Fellow, May 2023- Current

- Conducted research and assisted with drafting pleadings for a *Schlup* evidentiary hearing.
- Assisted with the advocacy for an individual with mental health conditions.

The National Health Law Program
Extern, January 2023- April 2023

- Drafted memos on federal privacy laws, medical loss ratio, independent medical review, and journalist's shield law and a blog post on Medicaid doula care.

O'Neill Institute for National & Global Health Law, Washington, D.C.
Addiction Policy Intern, May 2022- July 2022

- Researched and drafted memos on various issues relating to addiction policy and the law

Muslim American Society of Charlotte-Youth Division, Charlotte, North Carolina
Director, August 2019-June 2021

- Led community service, social activities, and fundraisers for the youth group.

CVS Pharmacy, Huntersville, North Carolina
Pharmacy Technician, September 2020-February 2021

Doital USA, Inc., Charlotte, North Carolina
Office Assistant for Property Manager, August 2019-March 2020

Mecklenburg County Court-Family Court Administration, Charlotte, North Carolina
Legal Intern, January 2019-April 2019

- Assisted the SelfServe Center staff and the Family Court staff

PUBLICATIONS

Hayfa Ayoubi, *When Desperate Times Should NOT Call for Desperate Measures: Fourth Amendment Protections Against (Unreasonable) Digital Surveillance that Became Standard Practice During the Pandemic*, N.C. J. L. & TECH. BLOG (Oct. 12, 2022).

Hayfa Ayoubi & Karishma Trivedi, How the Dobbs Ruling Will Affect People with Substance Use Disorder, BILL OF HEALTH BLOG (Aug. 16, 2022).

INTERESTS

Biking, boot camps, kickboxing, card games, and board games

Seq Nbr 1

ID 730500035 Hayfa Ayoubi

Internal Unofficial Transcript - UNC Chapel Hill

Pro Bono Program: 75+ Hours of Service

Name : Hayfa Ayoubi

Student ID: 730500035

Print Date : 2023-06-10

- - - - - Academic Program History - - - - -

Program : SL Juris Doctor

2021-06-25 : Active in Program

2021-06-25 : Law Major

- - - - - Beginning of School of Law Record - - - - -

2021 Fall

LAW	201	CIVIL PROCEDURE	4.00	4.00	B-	10.800
LAW	205	CRIMINAL LAW	4.00	4.00	B	12.000
LAW	209	TORTS	4.00	4.00	B-	10.800
LAW	295	RES,REAS,WRIT,ADVOC I	3.00	3.00	B	9.000
	TERM GPA : 2.840	TERM TOTALS :	15.00	15.00		42.600
	CUM GPA : 2.840	CUM TOTALS :	15.00	15.00		42.600

2022 Spr

LAW	204	CONTRACTS	4.00	4.00	B	12.000
LAW	207	PROPERTY	4.00	4.00	B	12.000
LAW	234A	CONSTITUTIONAL LAW	4.00	4.00	B	12.000
LAW	296	RES,REAS,WRIT,ADVOC II	3.00	3.00	B+	9.900
	TERM GPA : 3.060	TERM TOTALS :	15.00	15.00		45.900

	CUM GPA :	2.950	CUM TOTALS :	30.00	30.00		88.500

2022 Sum I

SUOP	700	SUMMER INTERNSHIP & RESEARCH		0.00		NE	
	TERM GPA :	0.000	TERM TOTALS :	0.00	0.00		0.000
	CUM GPA :	2.950	CUM TOTALS :	30.00	30.00		88.500

2022 Fall

LAW	220	ADMINISTRATIVE LAW		3.00	3.00	A-	11.100
LAW	242	EVIDENCE		4.00	4.00	B	12.000
LAW	266	PROF RESPONSIBILITY		2.00	2.00	B	6.000
LAW	398	HUMAN RIGHTS POLICY LAB		4.00	4.00	B+	13.200
	TERM GPA :	3.254	TERM TOTALS :	13.00	13.00		42.300
	CUM GPA :	3.042	CUM TOTALS :	43.00	43.00		130.800

2023 Spr

LAW	206	CRIM PRO INVESTIGATION		3.00	3.00	B+	9.900
LAW	301	LEGISLATIVE ADVOCACY		2.00	2.00	A-	7.400
LAW	358	JUDICIAL SENTENCING		3.00	3.00	B+	9.900
LAW	443	COMMERCIAL ARBITRATION		3.00	3.00	B+	9.900
LAW	500	EXTERNSHIP		6.00	6.00	PS	
	TERM GPA :	3.373	TERM TOTALS :	17.00	17.00		37.100
	CUM GPA :	3.109	CUM TOTALS :	60.00	60.00		167.900

2023 Sum I

SUOP	700	SUMMER INTERNSHIP & RESEARCH		0.00		NE	
	TERM GPA :	0.000	TERM TOTALS :	0.00	0.00		0.000
	CUM GPA :	3.109	CUM TOTALS :	60.00	60.00		167.900

2023 Fall

LAW	244	FAMILY LAW	3.00			
LAW	311	SUPREME COURT PROGRAM	3.00			
LAW	430	TRUSTS AND ESTATES	3.00			
LAW	465	CURRENT ISSUES LAW & MEDICINE	3.00			
LAW	516	CONTRACT DRAFTING	3.00			
	TERM GPA :	0.000	TERM TOTALS :	0.00	0.00	0.000
	CUM GPA :	3.109	CUM TOTALS :	60.00	60.00	167.900

2024 Spr

LAW	228	BUSI ASSOCIATIONS	4.00			
LAW	426	COMPLEX CIVIL LITIGATION	3.00			
LAW	451	HEALTH LAW ORGANIZATION	3.00			
LAW	468	REGULATION AND DEREGULATION	3.00			
LAW	545	PROSECUTOR PRACTICUM	2.00			
	TERM GPA :	0.000	TERM TOTALS :	0.00	0.00	0.000
	CUM GPA :	3.109	CUM TOTALS :	60.00	60.00	167.900

Cancel

June 17, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write this letter of recommendation on behalf of Hayfa Ayoubi who is applying for a clerkship with you. Ms. Ayoubi is a rising third-year law student at the University of North Carolina Law School. She was in my Human Rights Policy Lab, a four-credit rigorous writing class in which students learn international human rights law and engage in experiential work developing policy papers to assist individuals who have been tortured. In addition to formal class meetings, students meet with me at least one additional time on a weekly basis to discuss their research and projects, review questions, assess challenges, and plan next steps in small group settings. As a result, I had considerable opportunity to observe Ms. Ayoubi and evaluate her strengths and skills.

Ms. Ayoubi was always well-prepared for class. She asked and answered challenging questions, and indicated a dedication to grasping international norms and their application in circumstances that are considered quite challenging. She was well-spoken during class discussions and as reflected in her resume; she was a semifinalist in the Kilpatrick Mock Trial Competition and received the best advocate award for oral advocacy in her first year. Ms. Ayoubi was particularly thoughtful with regard to assigned readings and writing assignments. She often came up after class, distinguishing herself from her classmates, to ask follow-up questions. She was highly motivated to do well and indicated a sincere desire to excel in her writing skills. She has, in fact, published several law journal blogs to that end.

I also had an opportunity to observe Ms. Ayoubi collaborate with other students with whom she worked and shared responsibilities for preparing sections of the group policy project. She was congenial, supportive, and encouraging as she engaged with her colleagues.

Ms. Ayoubi has been fully engaged in the many opportunities provided by UNC Law School to obtain lawyering and professional skills. Her resume reflects her various volunteer activities and her significant hours to *pro bono* activity. Her externship experiences have widened her perspectives about the practice of law and have enabled her to acquire important skills that would be of use in a judge's chambers. She thoroughly enjoyed her course on judicial sentencing and has relayed to me that she has developed a better understanding of the judge's role in the administration of justice and has learned about sentencing policies and philosophies. A clerkship would allow her to learn more about the judicial process, refine her writing and research skills, and work with experienced judges and lawyers on complex legal issues.

I strongly support her application and hope you will consider her for a clerkship. If you would like any further information, please feel free to contact me (weissman@email.unc.edu) or by phone (919)962-5108.

Sincerely,

Deborah M. Weissman
Reef C. Ivey Distinguished Professor of Law
UNC School of Law

June 2, 2023

RE: Letter of Recommendation

Dear Hiring Manager:

My name is Skyler Rosellini and I am a Senior Attorney and intern coordinator with the National Health Law Program. I supervised Hayfa while she externed with NHeLP during the spring semester of 2023. I am writing this letter as a recommendation for Hayfa. I believe that her work ethic, her analytical and writing skills, and her ability to work through a diverse range of complex legal issues will make her an effective law clerk.

During her externship with NHeLP, Hayfa worked on a diverse range of projects related to health access. Projects included access to mental health, reproductive and sexual health, and dental services. Specifically, she drafted memoranda on federal health privacy laws as they apply to states, medical loss ratios related to dental services, the independent medical review process and how to expand in counties with more limited health plan appeal avenues, and the California "shield law" in the context of journalists' privacy with certain unpublished materials. She also consistently monitored *amicus curiae* efforts in cases related to low-income health care programs for our ongoing litigation efforts related to health access. Hayfa also drafted a publication on Medicaid coverage of doula care, which is a prominent health policy issue and a core part of our reproductive and sexual health substantive priorities. Her

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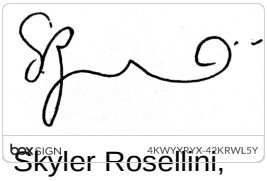
3701 Wilshire Boulevard, Suite 750 · Los Angeles, CA 90010 · (310) 204-6010
1512 E. Franklin Street, Suite 110 · Chapel Hill, NC 27514 · (919) 968-6308
www.healthlaw.org

publication was shared on our website and is a valuable source of information on the doula benefit as its popularity increases across the U.S.

Overall, I was impressed with Hayfa's responsiveness to constructive feedback and her curiosity and willingness to take on a diverse portfolio of projects with high levels of complexity. She was always a team player and willing to help our team with longer term projects and time sensitive ones, while being able to shift her work load to meet the deadlines in a timely manner. Hayfa also demonstrated a strong work ethic, which was evident through my communications and collaboration with her. Hayfa's strengths are her thorough and clear research and writing skills. She demonstrated her ability to carefully analyze new legal issues, particularly the applicability of the California Shield Law to health care investigations. Her confidence and ability to produce thorough and well-researched work product would make her a valuable addition to your department.

Thank you for your consideration. Should you have any questions, please do not hesitate to contact me at rosellini@healthlaw.org.

Sincerely,



Skyler Rosellini,
Senior Attorney


NATIONAL
HEALTH
LAW
PROGRAM

June 17, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing on behalf of Hayfa Ayoubi and recommending her for the clerkship position in your chambers. I worked with Hayfa as her first-year Legal Research, Reasoning, Writing, and Advocacy (RRWA) professor. I know her to be hardworking and eager for a chance to demonstrate her intellect and passion for the law. As noted below, Hayfa would be an asset to your chambers for multiple reasons.

First, Hayfa is a quick study. For a year, she worked hard to master structure, clarity, and depth in her writing. She worked independently and demonstrated initiative. At the same time, she welcomed feedback, and she always incorporated my instruction when necessary.

Moreover, even as a 1L course, RRWA involves relatively intense research instruction, and Hayfa was able to set herself apart in this regard as well. She demonstrated proficiency in researching state and federal statutes, regulations, cases, and secondary sources. Equally as important, she was able to apply the law she located. Hayfa's research skills are further evidenced by her submission materials. Even as a busy law student, she has prioritized time to research and write important journal and blog pieces.

Second, Hayfa is generous with her talent and spirit. In RRWA, the students learn in groups through various interactive exercises and activities. Proficiency levels can vary, so a student's interpersonal skills are often tested just as frequently as their analytical skills. Hayfa was an honest yet empathetic peer. She provided thorough yet fair feedback and never judged others or isolated herself.

Further, Hayfa is a pleasure to collaborate with. I know that a judge's chambers is an intimate work environment, and I believe that Hayfa will fit in well. In the time that I taught her, we met for an individual conference at least four times. Every time, she showed up prepared, pleasant, and ready to actively listen and learn. I know that your team would find her to be a wonderful colleague.

Overall, I am confident that Hayfa would not take this opportunity for granted. If you have any further questions, you can reach me at scardull@email.unc.edu or 985-320-7797. Thank you for your time.

Sincerely,

Annie Scardulla

United States District Court for the District of Arizona Tucson Division

Trilátero Tex-Mex, LLC, Plaintiff, -v- Hector's Restaurants, LLC, Defendant	Civil Action 21-1986 Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 56

Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment

The triangle-shaped tortillas are not protectable by the Lanham Act, because they're functional as a matter of law. The shape of the tortilla enhances its taste and allows for bonus filling after the meal, the advertising promotes the functionality of the triangle-shaped tortillas, and the design has a comparatively simple and inexpensive method of production. Accordingly, the defendant respectfully requests that the court enter judgment in its favor.

Statement of Facts

I. Plaintiff, Trilátero Tex-Mex, LLC, owns and operates 21 restaurants.

Plaintiff opened its first restaurant in 2007 and currently operates a chain of restaurants throughout California, Arizona, and Nevada, doing business under the name Trilátero Tex-Mex. Compl. ¶¶ 5, 6. The restaurant serves a menu of Mexican and Tex-Mex cuisine, including staples such as tacos, burritos, fajitas, enchiladas, quesadillas, and tortas, and has offered certain tortilla wraps in the shape of triangles. Compl. ¶ 8.

II. From the opening of its first restaurant, Plaintiff has consistently marketed its triangle-shaped tortillas in many different ways.

This includes the name of Plaintiff's restaurant—Trilátero—which translates "three-sided" and was chosen to associate the restaurant with triangle shapes. Compl. ¶ 11(a); Def.'s Mot. Summ. J. Ex. A, 19:25-26. It also includes the Plaintiff's logo, used prominently in signage, on menus, and on its website, which features a picture of a dinosaur holding a taco wrapped in a triangle-shaped tortilla. Compl. ¶ 11(b). In addition, Plaintiff has used many slogans that tout the advantages of triangle-shaped tortillas. These slogans include: "It Tastes Better on a Triangle"; "Taste the Triangle!"; and "Caution: Sharp Corners Ahead." 12. *Id.* ¶ 11(d).

III. Plaintiff makes its triangle-shaped tortillas with the same method and ingredients as its the typical round tortillas.

Plaintiff makes its triangle-shaped tortillas using the same ingredients and virtually the same method as standard round tortillas: the tortilla mixture is pressed down with an industrial tortilla press. *Id.* ¶¶ 15, 16. The only difference is that, after the tortillas are pressed into circles, an employee cuts them into triangles. *Id*. The employee then adds the cut off parts to the next batch of dough on the front end and runs it back through the machine. Ex. A, at 13:12-13. Making triangle tortillas doesn't cost any more than making round ones. *Id.* at 13:14.

IV. Taste is important in determining the shape of the tortilla.

Plaintiff testified that a square-shaped tortilla would not be workable due to the incorrect filling to tortilla ratio, whereas the triangle-shape has a similar ratio as the typical round tortilla. *Id. at* 17:13-14.

V. Many customers enjoy the triangle tortillas.

Internet reviews of Plaintiff's restaurants regularly refer to the triangle-shaped tortillas. Compl. ¶ 14. Ten percent of the customer reviews mentioned liking the ratio of filling to tortilla and that the triangle shape made some of the filling fall out. Ex. A, at 19:19-20.

VI. Defendant owns and operates four different restaurants in Arizona, including one restaurant which serves triangle tortillas.

Defendant, Hector's Restaurants, LLC, opened its first restaurant in Tempe, Arizona in 2015 and currently has four restaurants across Arizona. Compl. ¶ 18; Ex. A, at 10:5. Defendant began serving some of its menu items on triangle-shaped tortillas in its Phoenix restaurant in 2018 and has since begun to serve some menu items on triangle-shaped tortillas in many of its restaurants. Compl. ¶ 20. For at least two years, Defendant has marketed its restaurants' use of triangle shaped tortillas in many ways, including that Defendant's advertising included the slogan "We Don't Cut Corners." *Id.* ¶ 21.

VII. Claiming that its triangle-shaped tortillas constitute trade dress, plaintiff filed a complaint pursuant to the Lanham Act, 15 U.S.C.A. § 1125, alleging that defendant infringed on its trade dress.

Argument

I. Defendant should be granted the motion for summary judgment under Rule (56).

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

a. There is no genuine dispute as to any material fact.

From the start of this litigation, there has been no dispute over the facts of the case. Plaintiff, Trilátero Tex-Mex, LLC, and defendant, Hector's Restaurants, LLC. agree that in 2017, defendant, who owns and operates four restaurants in Arizona, started serving its own version of triangle-shaped. Compl. ¶ 18, 20; Answer 18, 20. Parties further agree that plaintiff, which owns and operates twenty-one restaurants throughout California, Nevada, and Arizona and has been in business since 2007, serves some of the food items on triangle-shaped tortillas. Compl. ¶ 5-7, 9; Def.'s Mot. Summ. J. Ex. B, 14:14, 28. Evidently, there is no genuine dispute as to any material fact.

b. Defendant is entitled to judgment as a matter of law, because the triangle-shaped tortilla is functional and is therefore not protected as a trade dress under the Lanham Act.

To prove that a competitor infringed trade dress under section 43(a) of the Lanham Act, the owner of the claimed trade dress must prove three elements: (1) the product's design is nonfunctional, (2) the design is distinctive, and (3) the public will likely confuse the two products. *Disc Golf Ass'n, Inc. v. Champion Discs, Inc*., 158 F.3d 1002, 1005 (9th Cir. 1998).

In general, trade dress includes the overall look of a product and its packaging, including the design and shape of the product itself. *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 28 (2001). A product feature is functional and cannot serve as a trademark if it is essential to the use or purpose of the article or if it affects the cost or quality of the article. *Id.* at 34.

To determine whether a product feature is functional, the court should consider these three factors: (1) whether the design yields a utilitarian advantage, (2) advertising touts the

utilitarian advantages of the design, and (3) whether the particular design results from a comparatively simple or inexpensive method of manufacture. *Disc Golf* , 158 F.3d at 1006.

First, we will analyze how the design and shape of the triangle-shape tortilla makes utilitarian advantages. Then, we will discuss how the plaintiff's advertising promoted the functional advantages of the product. Finally, we will show how the design has a comparatively simple and inexpensive method of production.

1. **The triangle-shape of the tortilla improves the taste of food and enhances the eating experience by allowing some of the filling to fall out.**

   The issue is not whether a product is functional, but whether this particular shape and form of product which is claimed as trade dress is functional. *Disc Golf Ass'n, Inc.*, 158 F.3d at 1008. The product feature does not have to provide multiple utilitarian advantages and one utilitarian advantage is sufficient. *Id.* at 1007.

   The Ninth Circuit has not yet analyzed whether the effect of the product's shape on its taste is considered functional, but the Eleventh circuit held that a design or shape that contributes to the taste and consistency of a product is deemed essential to the product's purposes and affects its quality. *See Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC*, 369 F.3d 1197, 1206 (11th Cir. 2004). Furthermore, the customer's perception of the product due to its shape and design speaks to the functionality of the product. *See id*. In *Dippin' Dot*s., the court found that the spherical shape of dippin' dots allows for the quick and even freeze which is important to the taste and consistency of the product, making a product functional. *Id.* The court also relied on the fact that 20% of customers believed that the spherical shape of the ice cream

enhanced the ice cream's flavor as a factor in assessing the utilitarian advantage of the product. *Id.*

In *Blumenthal*, the court ruled that Eames chairs' design yields no utilitarian advantage because the designers were focused on finding the exact right look of the chair and were mostly concerned with the visual or aesthetic impact of the product. *Blumenthal Distributing, Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 863 (9th Cir. 2020).

Here, the triangle shape of the tortilla provides not only one but two utilitarian advantages. Similar to how the spherical shape of the ice cream enhances the taste and consistency of the product in *Dippin' Dots*, the triangle shape creates a desirable filling to tortilla ratio and enhances the eating experience by allowing some of the filling to fall out. Ex. A, at 19:19-20. The shape of the tortilla allows for the proper distribution of the filling, which evidently affects the ratio of tortilla and filling, making it important for the taste of the product. Similar to how the opinion of a minority of the customers was considered a factor in weighing the functional advantage of the product, 10 percent of the Trilátero's customers mentioned liking the ratio of filling to tortilla in triangle-shaped tortilla and enjoyed the falling out of the filling and that further proves the functional advantage of the triangle tortilla. *Id.*

In comparison to *Blumenthal's* Eames chairs' design which was based on aesthetic concerns, Trilátero was mainly concerned with the filling and tortilla ratio in determining the shape of the tortilla and less concerned with creating a product that is unique. Trialtero testified that a square-shape would not be workable presumably due

to the incorrect filling to tortilla ratio, whereas the triangle-shape has a similar, if not more desirable, ratio as the typical round tortilla. *Id.* at 17:13-14, 19:19-20.

Therefore, the triangle shape of the tortilla improves the taste of food and enhances the eating experience by allowing some of the filling to fall out.

2. Advertising of the product promoted the utilitarian advantages of the design.

If a seller advertises the utilitarian advantages of a particular feature, this constitutes strong evidence of functionality. *Disc Golf Ass'n, Inc.,* 158 F.3d at 1008.

The advantages of a specific design feature need not be touted explicitly, but may be implied from the advertisement as a whole. *Id.* In *Disc* Golf, the court found that while the plaintiff's advertising of its parabolic disc gold never mentions the term "parabolic," the inference of functionality is implicit in the advertising. *Id.* The phrasing used in the advertisement, coupled with a picture of a flying disc falling into a basket after hitting the parabolic chain, is enough evidence that its advertising promotes the functionality of the parabolic chain. *See Id.*

Advertising that touts functional features but includes messages aimed at nonfunctional features is, nonetheless, considered to promote the functionality of the product. *See Talking Rain Beverage Co. Inc. v. S. Beach Beverage Co.*, 349 F.3d 601, 604 (9th Cir. 2003). In *Talking Rain,* the plaintiff's use of "get a grip" as its slogan for the grip bottle promotes the functionality of the recessed area of the bottle which can provide a secure grip of the bottle. *Id.* at 603-04. While the plaintiff argued that its slogan has another meaning because it's a slang expression, the court reasoned that it's sufficient that the slogan promoted the functionality regardless of other potential interpretations. *Id.*

In the present case, the plaintiff's main slogan is "It tastes better in a triangle". Compl. ¶ 11(d). One of the utilitarian advantages of a triangle-shaped tortilla is the enhanced taste associated it with the tortilla to filling ratio. The language of the slogan clearly links the better taste to the triangle shape and alludes to a more enjoyable eating experience that results from the triangle shape of the product.

Similar to how the advertising in *Disc Golf* did not explicitly address the parabolic chain feature but was considered to promote the functionality of the feature when coupled with a picture that promotes the utility of the feature, advertising that doesn't explicitly promote the enhanced taste of the triangle-shape tortilla could be considered to promote that utilitarian feature when coupled with the name and logo of the restaurant. In some instances, the plaintiff uses certain phrases in advertising, such as "Mmm, Pointy" and "Taste the triangle". *Id*. The plaintiff crafted a name for the restaurant, Trilátero which means three-sided, in order to associate the restaurant with triangle shapes. Ex. A, at 19:25-26. In addition, the restaurant logo is a picture of a T. Rex holding a triangle-shaped taco. Compl. ¶ 11(b). On the face of it, phrases like and "Mmm, Pointy" and "taste the triangle" do not necessarily promote the enhanced taste associated with the triangle-shaped tortilla. However, when coupled with the name of the restaurant which references the triangle-shape as well as the logo with a triangle-shaped taco, it could be inferred that these phrases indeed advertise for the enhanced taste associated with the triangle shape of the product.

Similar to how the slogan "get a grip" in *Talking Rain* was deemed to be touting the functional feature of the grip bottle despite it being a slang expression with non-utilitarian interpretations, advertising that uses slang expressions yet promotes the

enhanced taste of the triangle-shaped tortilla is sufficient. On some occasions, plaintiff uses phrases in advertising, such as "Caution: Sharp Corners Ahead" and "Don't Be a Square". *Id.* ¶ 11(d). The defendant uses the slogan "We Don't Cut Corners." *Id.* ¶ 21. While these may be used as warning expressions or metaphors, they also clearly reference and imply the importance of the shape of tortilla. Moreover, when these expressions are interpreted in the context of a restaurant that has a name and a logo that promote the triangle-shaped tortillas, it could be inferred that these phrases indeed advertise for the utilitarian feature of the product.

Therefore, the advertising of the triangle-shaped tortilla promotes the utilitarian advantages of the product.

3- The design has a comparatively simple and inexpensive method of production.

A functional benefit may arise if the design achieves economies in manufacture or use. *Disc Golf Ass'n, Inc.,* 158 F.3d at 1008. A design achieves economies in manufacture or use when it is relatively simple or inexpensive to manufacture. *Id.*

In *Talking Rain*, the court found that because the grip feature reflects a comparatively simple method of manufacturing a structurally sound bottle that would not collapse, the trademarked bottle is functional. *Talking Rain Beverage Co. Inc.*, 349 F.3d at 604.

In *Blumenthal*, the trapezoidal frame and the one-piece seat and back of the Eames chair required at least some specialized technical equipment to manufacture, and therefore does not suggest a simple or inexpensive method of manufacture. *Blumenthal Distributing, Inc.*, 963 F.3d at 864.

The Ninth Circuit has not yet analyzed how the cost of the ingredients for making a product is assessed under functionality, but the Seventh Circuit held that products that utilize more expensive materials when compared to similar products do not achieve economies in manufacture. *Bodum USA, Inc. v. A Top New Casting Inc.*, 927 F.3d 486, 494 (7th Cir. 2019). In Bodum, the court ruled that that the Chambord French coffeemaker confers no cost or quality advantage that made it functional. *Id.* Of the many French presses that Bodum produced, the production of the Chambord is more expensive to produce than its counterparts with plastic frames, because its frame is made out of the more-expensive metal materials. *Id.*

Similar to how the production of grip feature provided the advantage of a non-collapsing bottle thereby making the manufacturing process efficient, the production of triangle tortilla made it possible to make a more desired tortilla while reusing the left over dough thereby making the manufacturing process efficient. Instead of losing dough, the employee adds the cut off parts to the next batch of dough and runs it back through the machine. Ex. A, at 13:12-13. It can be clearly established that the production of triangle tortillas made the manufacturing process efficient by saving and reusing dough.

In comparison to the Eames chair in *Blumenthal,* making triangle-shape tortillas does not require any specialized technical equipment to make. Instead, triangle tortillas are made using the same automatic tortilla-maker that rolls and presses the typical round tortillas, and are then cut to make it triangle. Compl. ¶ 16. Evidently, the triangle tortillas do not require any specialized technical equipment to make.

In comparison to the Chambord French press, Trilátero's triangle-shaped tortillas have the exact same ingredients as the typical round tortillas. Plaintiff makes its triangle-shaped tortillas with the same ingredients as standard round tortillas. Compl. ¶ 15. Making triangle tortillas doesn't cost any more than making round ones. Ex. A, at 13:14. It is clear that there no additional costs arising from the ingredients of the triangle tortilla.

Therefore, the design has a comparatively simple and inexpensive method of production.

Defendant is entitled to judgment as a matter of law, because the triangle-shaped tortilla is functional and is therefore not protected as a trade dress under the Lanham Act.

Conclusion

For the foregoing reasons, defendant Hector's Restaurants, LLC respectfully requests that this court enter judgment in its favor.

Applicant Details

First Name	**Emily**
Middle Initial	**A**
Last Name	**Baker**
Citizenship Status	**U. S. Citizen**
Email Address	**eabaker02@wm.edu**
Address	**Address** Street **150 Kings Manor Drive, Apt 9213** City **Williamsburg** State/Territory **Virginia** Zip **23185** Country **United States**
Contact Phone Number	**(434)882-5330**

Applicant Education

BA/BS From	**James Madison University**
Date of BA/BS	**May 2021**
JD/LLB From	**William & Mary Law School** **http://law.wm.edu**
Date of JD/LLB	**May 18, 2024**
Class Rank	**10%**
Law Review/Journal	**Yes**
Journal(s)	**William & Mary Bill of Rights Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hendrickson, Erin J.
ejhendrickson@wm.edu
757-221-7457
Larsen, Allison Orr
amlarsen@wm.edu
(757) 221-7985
Gershowitz, Adam M.
amgershowitz@wm.edu
757-221-7363

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Emily Baker
150 Kings Manor Dr, Apt 9213
Williamsburg, Virginia 23185
(434) 882-5330 | eabaker02@wm.edu

June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court, Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker:

I am a rising third-year student at William & Mary Law School, where I am ranked 11/175 (tied) in my class with a 3.7 GPA and serve as the Executive Editor of the *William & Mary Bill of Rights Journal*. I am seeking a clerkship in your chambers beginning August 2024. My experiences interning for a federal magistrate judge and a federal public defender, coupled with my highly developed research, writing, and analytical skills, will enable me to bring value as your clerk.

As an extern with U.S. Magistrate Judge Douglas E. Miller and as an intern with the Federal Public Defender's Office, I developed a familiarity with federal law and practice, having seen what it is like to work in chambers and serve as an advocate in federal court. Through my externship with Judge Miller, I gained valuable experience researching complex legal issues which resulted in my drafting a report and recommendation for a petition for habeas corpus and an order on a motion in limine in multidistrict antitrust litigation, and assisting Judge Miller in a settlement conference. With the Federal Public Defender's Office for the Western District of Virginia, I shadowed Assistant Federal Public Defenders, drafted sentencing memoranda that convinced the Judges to sentence below the guidelines range, drafted a successful motion for a bill of particulars, and conducted research that was eventually incorporated into my supervising attorneys' arguments and briefs in the Western District of Virginia and the Fourth Circuit. As Executive Editor for the *William & Mary Bill of Rights Journal*, I coordinate our publication schedule and perform substantive and technical edits of scholarly articles. These experiences have further reinforced my interest in serving as a judicial clerk.

For your review, I have enclosed my resume, unofficial law school transcript, writing sample, and letters of recommendation from William & Mary Law Professors Allison Orr Larsen, Adam Gershowitz, and Erin Hendrickson. I would be grateful for the opportunity to discuss my qualifications, skills, and abilities in an interview. Thank you for your consideration.

Respectfully,

Emily Baker

EMILY A. BAKER

150 Kings Manor Dr, Apt. 9213 | Williamsburg, Virginia 23185
eabaker02@wm.edu | (434) 882-5330

EDUCATION

William & Mary Law School, Williamsburg, Virginia
J.D. expected, May 2024
G.P.A.: 3.7 Class rank: 11/175 (tied)
Honors: ***William & Mary Bill of Rights Journal***, Executive Editor
Publications: *Fourteen Going on Forty: Challenging Registration for Juvenile Offenders Under the Fourteenth Amendment Equal Protection Clause*, WM. & MARY BILL RTS. J. (forthcoming 2023)
Activities: Student Bar Association, Vice President
Election Law Society, Alumni Chair

James Madison University, Harrisonburg, Virginia
B.A., *magna cum laude,* Political Science and English, May 2021
G.P.A.: 3.8
Honors: Phi Beta Kappa
Gorry Scholarship Recipient (for excellence in Political Science)
McMurray Scholarship Recipient (for excellence in American Literature)
Activities: Phi Mu Fraternity, President
Student Government Association, Membership Chair

EXPERIENCE

Williams Mullen, Norfolk, Virginia
Incoming Summer Associate — Summer 2023

Willcox & Savage, Norfolk, Virginia
Summer Associate — Summer 2023
Provide legal research and writing in support of litigation, including memorandums and bench briefs on toxic tort causation, specific performance in commercial real estate, and First Amendment defenses.

Hon. Douglas E. Miller, U.S. District Court, Eastern District of Virginia, Norfolk, Virginia
Legal Extern — Spring 2023
Conducted research and drafted a report & recommendation on a habeas corpus petition, an order on a motion in limine, and a bench memorandum summarizing allegations in multidistrict antitrust litigation. Observed various court proceedings.

Office of the Federal Public Defender for the Western District of Virginia, Charlottesville, Virginia
Legal Intern — Summer 2022
Conducted research and drafted sentencing memoranda that resulted in a below-guidelines sentence. Drafted a successful motion for a bill of particulars and a motion to dismiss, and contributed to the drafting of an appellate brief. Met with clients to prepare for trial and sentencing, reviewed discovery and drafted summaries of state grand jury proceedings on a white collar case that was used in formulating trial strategy.

Office of Governor Ralph S. Northam, Richmond, Virginia
Governor's Fellow, Secretariat of Agriculture and Forestry — Summer 2021
Drafted policy memos, press releases, and social media posts related to food access policy. Engaged with community members and industry stakeholders to address the long-term needs of agricultural producers, businesses, and communities through legislation, grant programs, and connecting constituents to government services.

INTERESTS: tennis, intramural flag football, the New York Times crossword, and making homemade pasta

WILLIAM & MARY
LAW SCHOOL
OFFICE OF CAREER SERVICES

Unofficial Transcript

Note to Employers from the Office of Career Services regarding Grade Point Averages and Class Ranks:

- Transcripts report student GPAs to the nearest hundredth. **Official GPAs are rounded to the nearest tenth and class ranks are based on GPAs rounded to the nearest tenth.** We encourage employers to use official Law School GPAs rounded to the nearest tenth when evaluating grades.
- Students are ranked initially at the conclusion of one full year of legal study. Thereafter, they are ranked only at the conclusion of the fall and spring terms. William & Mary does not have pre-determined GPA cutoffs that correspond to specific ranks.
- Ranks can vary by semester and class, depending on a variety of factors including the distribution of grades within the curve established by the Law School. Students holding a GPA of 3.6 or higher will receive a numerical rank. All ranks of 3.5 and lower will be reflected as a percentage. The majority of the class will receive a percentage rather than individual class rank. In either case, it is likely that multiple students will share the same rank. Students with a numerical rank who share the same rank with other students are notified that they share this rank. Historically, students with a rounded cumulative GPA of 3.5 and above have usually received a percentage calculation that falls in the top 1/3 of a class.
- Please also note that transcripts may not look the same from student-to-student; some individuals may have used this Law School template to provide their grades, while others may have used a version from the College's online system.

STUDENT INFORMATION

Name : Emily A. Baker

Curriculum Information

Current Program

Juris Doctor

College: School of Law

Major and Department: Law, Law

***Transcript type:WEB is NOT Official ***

DEGREES AWARDED

Sought: Juris Doctor **Degree Date:**

Curriculum Information

Primary Degree

College: School of Law

Major: Law

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Institution:	12.000	12.000	12.000	8.000	31.40	3.92

INSTITUTION CREDIT -Top-

Term: Fall 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	101	LW	Criminal Law	A-	4.000	14.80	
LAW	102	LW	Civil Procedure	A-	4.000	14.80	
LAW	107	LW	Torts	A-	4.000	14.80	
LAW	130	LW	Legal Research & Writing I	B+	2.000	6.60	
LAW	131	LW	Lawyering Skills I	P	1.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	51.00	3.64
Cumulative:	15.000	15.000	15.000	14.000	51.00	3.64

Unofficial Transcript

Term: Spring 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	108	LW	Property	B+	4.000	13.20	
LAW	109	LW	Constitutional Law	A	4.000	16.00	
LAW	110	LW	Contracts	B+	4.000	13.20	
LAW	132	LW	Legal Research & Writing II	A-	2.000	7.40	
LAW	133	LW	Lawyering Skills II	P	2.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	14.000	49.80	3.55
Cumulative:	31.000	31.000	31.000	28.000	100.80	3.60

Unofficial Transcript

Term: Fall 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	115	LW	Professional Responsibility	A-	2.000	7.40	
LAW	398	LW	Election Law	A-	3.000	11.10	
LAW	400	LW	First Amend-Free Speech & Pres	B+	3.000	9.90	
LAW	411	LW	Antitrust	A-	3.000	11.10	
LAW	593	LW	Disaster Law & Ldrship Seminar	A	3.000	12.00	
LAW	761	LW	W&M Bill of Rights Journal	P	1.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	51.50	3.67
Cumulative:	46.000	46.000	46.000	42.000	152.30	3.62

Unofficial Transcript

Term: Spring 2023

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	301	LW	ElecLaw Prac-LawyeringCampaign	P	1.000	0.00	
LAW	401	LW	Crim Proc I (Investigation)	A	3.000	12.00	
LAW	440	LW	Federal White Collar Crime	A-	2.000	7.40	
LAW	488	LW	Youth Law	A	3.000	12.00	
LAW	754	LW	Judicial Externship	P	2.000	0.00	

LAW	761	LW	W&M Bill of Rights Journal		P	1.000	0.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	12.000	12.000	8.000	31.40	3.92
Cumulative:	58.000	58.000	58.000	50.000	183.70	3.67

Unofficial Transcript

TRANSCRIPT TOTALS (LAW - FIRST PROFESSIONAL) -Top-

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	58.000	58.000	58.000	50.000	183.70	3.67
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	58.000	58.000	58.000	50.000	183.70	3.67

Unofficial Transcript

COURSES IN PROGRESS -Top-

Term: Fall 2023

Subject	Course	Level	Title	Credit Hours
LAW	309	LW	Evidence	3.000
LAW	320	LW	Business Associations	4.000
LAW	449	LW	Data & Democracy Seminar	3.000
LAW	761	LW	W&M Bill of Rights Journal	2.000
LAW	782	LW	Special Educ Advocacy Clinic I	3.000

Erin J. Hendrickson
Professor of the Practice of Law

William & Mary Law School
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Fax: 757-221-3261
Email: ejhendrickson@wm.edu

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Emily Baker

Dear Judge Walker:

I write in enthusiastic support of Emily Baker's clerkship application. I served as Emily's Legal Research & Writing professor during both semesters of her 1L year. At the conclusion of the spring semester, I specifically encouraged Emily to apply for post-graduation clerkships, as I believe she would be especially effective in this position.

As an initial matter, Emily unquestionably has a strong skill set. She easily understands the relevant holdings and reasoning in precedent cases, and she quickly picks up on ambiguities or gray areas that could present future legal questions. When analyzing novel fact patterns, Emily is skilled at recognizing potential counterpoints, and she can effectively present various lines of reasoning in a clear and concise manner.

Perhaps even more importantly, Emily genuinely enjoys the challenge of putting together an effective legal analysis, which makes working with her both efficient and rewarding. When encountering new or difficult tasks, Emily understood the importance of first working independently to see what she could solve on her own. In other words, Emily was much more self-sufficient than many of my other students. At the same time, Emily also understood the value of receiving feedback, and she came to me at appropriate times in the drafting process with thoughtful questions, outlines, or drafts, that allowed me to understand her thought process and to quickly help her get to the next step. In the classroom, Emily frequently contributed to classroom discussions with helpful insights, and she enthusiastically participated in group work and peer-editing exercises. In these contexts, Emily selflessly shared her knowledge with peers, and she also demonstrated a genuine desire to learn from others' perspectives and approaches.

Emily's dedication to our course was reflected in her growth over the year. While Emily's fall semester work product was strong on its own right, her spring semester work product was even stronger, demonstrating Emily's ability to use constructive feedback to build her own skill set. In fact, her final spring semester memo received the second highest score in her class section. In that assignment, Emily made especially good use of various canons of statutory construction to make an argument on an issue of first impression. Further, she greatly impressed me by successfully making all the legal arguments I expected to see while using only 80% of the maximum word count, something that very few of my students have ever been able to accomplish.

In short, Emily is a highly professional, talented, and dedicated student who would make a stellar law clerk. I very much hope that you will grant her the opportunity to interview for this position.

Sincerely,

/s/

Erin J. Hendrickson
Professor of the Practice of Law

Allison Orr Larsen
Engh Research Professor, Associate Dean for Research and Faculty Development, Alfred Wilson & Mary I.W. Lee Professor of Law, and Director, Institute of the Bill of Rights Law

William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187-8795
Phone: 757-221-7985
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June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Emily Baker

Dear Judge Walker:

I am a law professor at William & Mary and a student of mine, Emily Baker, has applied to be your law clerk. Emily is ranked in the top 15% of her class – her grades are the 25th highest in a class of 174. More than that, however, Emily is a true leader among her peers and a great asset to someone who has a busy schedule. Emily is a "get stuff done" kind of person; I look forward to saying "I knew her when."

I met Emily when I taught her in Constitutional Law her first year of law school. Emily was one of those students who didn't volunteer often but when she did speak, she always revealed that she was thoroughly engaged in the material. Emily is quick to spot contradictions in doctrine, and she understands the application of even the most difficult constitutional theories. I was therefore not surprised when Emily received an A minus on my Con law exam (only 15% of the class earns those grades). I impose strict word limits and time constraints on my exam. It is therefore impressive that Emily not only hit all the right issues but did so in a well-organized and efficient way. I am not surprised that she has done so well in law school given her talent at legal analysis and gift for concise writing.

Most of my interaction with Emily, however, has taken place outside of the classroom. This past academic year I served as Associate Dean at the law school and as part of my job I was determined to bring back the sense of community we had before the COVID-19 pandemic. Part of my plan was to bring food trucks to campus regularly. This, however, was a daunting task. I found myself tied up in fights with procurement and parking services and I think my hair turned gray. Enter Emily. As Vice President of the Student Bar Association, Emily volunteered to help me in my food truck quest. She independently found the people she needed to persuade, recruited a slate of food truck providers, and was never deterred by a roadblock. She fought the red tape valiantly but respectfully – figuring out potential solutions to the problems she encountered before coming to me and always doing so in a way that was respectful of my time and energy. In the end, Emily was victorious on the food-truck front and I was able to just entirely delegate that part of my job to her and enjoy the food trucks like everyone else. I look and feel ten years younger.

Having clerked twice myself (once for Judge Wilkinson on the U.S. Court of Appeals for the 4th Circuit and once for Justice Souter on the U.S. Supreme Court), I know the value a clerk can add for a judge with a heavy caseload and a demanding schedule. Emily fits the bill exactly. Not only is she intelligent and a hard worker, but Emily is just extraordinarily helpful. Perhaps from her experience working in the Governor's Office, Emily knows how to approach a superior in a way that takes things off the boss's plate and doesn't add more to it. I imagine that particular skill is hard to teach and even harder to detect when looking for a law clerk.

Please feel free to contact me if I can be of further assistance.

Sincerely,

/s/

Allison Orr Larsen
Engh Research Professor,
Associate Dean for Research and Faculty Development,
Alfred Wilson & Mary I.W. Lee Professor of Law, and
Director, Institute of the Bill of Rights Law

Adam M. Gershowitz
Vice Dean and R. Hugh and Nolie Haynes Professor Law

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William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187-8795

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It gives me great pleasure to write in support of Emily Baker's application for a position in your chambers. Emily is a terrific student at William & Mary Law School, while also being extremely involved in the community. I am certain that she will be an excellent law clerk.

Emily has done exceedingly well in law school. She has a GPA of 3.7, which puts her toward the very top of the class (top 14%). More importantly, she has consistently improved throughout law school. After her first year, she had a GPA of 3.60. The following semester she achieved even better grades, and last semester she had nearly straight A's. Her term GPA last semester was 3.92. Emily's upward trajectory shows that she was not only sharp from the beginning, but also that she is a very quick learner who can adapt to the settings around her and learn to meet and exceed expectations in new circumstances.

I was pleased to teach Emily last semester in Criminal Procedure. She performed very well on the exam, earning one of a handful of As in a large class. Equally important, Emily was a standout student during class sessions. Even though the class was very large (which is intimidating for many students), Emily frequently raised her hand to speak. She had thoughtful comments and often moved the discussion forward in a productive way. In a class of more than 70 students, she was one of a small number of memorable voices who I could turn to when the rest of the room fell silent.

As I noted, Emily's grades place her toward the top of the class. Some students accomplish that by focusing only on their grades. Emily has achieved excellent grades while being deeply involved in the Law School community. She has served as the Executive Editor of the Bill of Rights Journal, she has been active with the Election Law Society, and she holds a key leadership position with the Student Bar Association.

One thing to notice is not just that Emily has been involved in extracurricular activities. (As you know, lots of students join various groups without putting in much effort.) But Emily has not just been a member of various groups; she has been a leader in the groups. She holds one of the top leadership positions on the well-regarded Bill of Rights Journal. She ran for and was elected by her peers to the number two position in the Student Bar Association. (This position is not a sinecure. The SBA Vice President is very active in advocating for students.) Emily also holds a board position with the Election Law Society.

Finally, and perhaps most importantly from a judge's perspective, Emily is an excellent writer. (Sadly, this is not something I can say about all law students.) Emily's exam in my course was not just substantively impressive; it was extremely well organized, concise while being thorough, and the grammar and sentence structure were excellent. It is also noteworthy that Emily's law journal note was accepted for publication in her 2L year. Very few student notes are accepted for publication, and even fewer are accepted in this early part of the submission cycle. The early acceptance of her note indicates that Emily's early drafts were very well written and that she showed a lot of self-sufficiency and industriousness to not only focus on the content but also to perfect the written product. I teach many exceptionally bright law students each year, but unfortunately many students enter law school without significant writing experience in college. Some students never catch up. I know writing is a crucially important skill that judges need in their clerks. I have no hesitation in saying that Emily will do an excellent job writing bench memoranda, orders, and first drafts of opinions.

I am confident that Emily will be a terrific law clerk. She is extremely smart, hard-working, an excellent writer and a true leader among her peers. It is my pleasure to recommend her for a clerkship in your chambers. If you have any questions, please feel free to call me at (757) 221-7363.

Sincerely,

/s/

Adam M. Gershowitz
Vice Dean and R. Hugh and Nolie Haynes Professor Law

Adam M. Gershowitz - amgershowitz@wm.edu - 757-221-7363

EMILY BAKER
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WRITING SAMPLE

I prepared this brief during my externship with the Honorable Judge Douglas E. Miller and have obtained consent to use it as a writing sample. This is substantially my own work.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JOHN RAGIN, #1355505,

Petitioner,

v. **Civil Action No.: 2:22-cv-337**

HAROLD W. CLARKE, Director, Department of Corrections, et al.

Respondents.

REPORT AND RECOMMENDATION

Pro se Petitioner John Ragin ("Ragin" or "Petitioner") filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 challenging his convictions of three counts of capital murder, second-degree murder, arson, and four counts of stabbing in the commission of a felony. (ECF No. 1). Ragin, who was sentenced to four life sentences plus sixty years, alleges a number of constitutional, statutory, and international law violations. Respondent Harold W. Clarke ("Respondent") moves to dismiss the Petition, (ECF No. 11), arguing that the Petition is time-barred under 28 U.S.C. § 2244(d) and procedurally defaulted, Resp't Br. Supp. Mot. Dismiss ("Resp't Br.") (ECF No. 12). Along with the motion, Respondent provided the notice to pro se parties required by Local Rule 7(K) and the Fourth Circuit's decision in Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975). Because Ragin's Petition is time-barred, this Report recommends that the court grant Respondent's motion to dismiss.

I. STATEMENT OF THE CASE

On June 26, 2014, Ragin was convicted in the Newport News Circuit Court for three counts of capital murder, one count of second-degree murder, arson of an occupied dwelling, and four counts of stabbing in the commission of a felony. Resp't Br. (ECF No. 12, at 1). He was sentenced

to 4 life sentences plus 60 years incarceration. Id. Ragin appealed his conviction to the Court of Appeals of Virginia, arguing that the trial court erred in denying his motion to suppress evidence found in a bedroom in his parents' residence located in South Carolina. Resp't Br., Ex. 1 (ECF No. 12-1, at 2). The Court of Appeals denied his appeal on October 29, 2015. Resp't Br. (ECF No. 12, at 1). Ragin then appealed to the Virginia Supreme Court, which refused his appeal on June 17, 2016 and denied his petition for rehearing on October 6, 2016. Id. Ragin filed a writ of habeas corpus in state court on October 17, 2017, arguing that his trial and appellate counsel were ineffective, the trial court was biased against him, and his due process rights were violated. Id. at 2–3. The Newport News Circuit Court dismissed the petition on August 8, 2019, Ragin did not appeal. Id. at 3. He later filed a petition for a writ of mandamus to the Virginia Supreme Court on August 11, 2020, which was dismissed on January 25, 2021. Resp't Br., Ex. 3 (ECF No. 12-3). His petition for rehearing was denied on March 25, 2021. Resp't Br. (ECF No. 12, at 6). Ragin then filed a petition for a writ of habeas corpus with the Virginia Supreme Court, on July 2, 2021, which was dismissed as untimely on October 18, 2021. Resp't Br. (ECF No. 12, at 3). A petition for rehearing was denied on February 4, 2022. Id. He applied for a writ of certiorari to the United States Supreme Court on August 16, 2021, attempting to appeal the Virginia Supreme Court's decisions on his petition for a writ of mandamus. Pet. (ECF No. 1, at 9). The Supreme Court denied the petition on January 10, 2022, and denied his petition for rehearing on March 21, 2022. Id.

Ragin filed his first federal Petition for a Writ of Habeas Corpus on July 21, 2022, alleging constitutional, statutory, and international law violations, including trial court bias during post-conviction proceedings, violations of Petitioner's due process rights, and ineffective assistance of counsel at both the trial and appellate level. Resp't Br. (ECF No. 12, at 4). Specifically, Ragin

alleges that he is unlawfully detained in violation of the Fourteenth Amendment Due Process Clause because the trial judge did not recuse himself and did not hold a hearing in the subsequent habeas proceeding. Pet. (ECF No. 1 at, 16–17). Ragin also alleges numerous violations during trial and appellate court proceedings including ineffective assistance of counsel, prosecutorial misconduct, and the introduction of allegedly false evidence into the record. Id. at 22–23. According to Ragin, he received ineffective assistance of counsel during the trial court proceedings because counsel allowed the state to use false evidence, and during appellate court proceedings because counsel did not raise structural or plain errors and claimed his right to testify was waived. Id. Additionally, he alleges that the presumption of innocence in criminal trials was violated, and that the prosecution failed to prove the *mens rea* required for his convictions. Id. at 18. Ragin also alleges that the Supreme Court of Virginia erred by failing to grant his motion for a writ of mandamus. Id. at 19.

Respondent filed his Rule 5 Answer and Motion to Dismiss, along with a brief in support on September 16, 2022. Resp't Br. (ECF Nos. 11, 12). His motion, which was accompanied by detailed records of Ragin's appellate and post-conviction filings—argues that Ragin's claims are procedurally defaulted and barred from federal review. Id. Ragin responded to the Motion, (ECF Nos. 20, 22), which is now ripe to resolve.

II. STANDARD OF REVIEW

A motion to dismiss "challenges the legal sufficiency of a complaint considered with the assumption that the facts alleged are true." Francis v. Giacomelli, 588 F.3d 186, 192 (4th Cir. 2009) (internal citations omitted) (discussing Fed. R. Civ. P. 12(b)(6)); see also Goard v. Crown Auto, Inc., 170 F. Supp. 3d 915, 917 (W.D. Va. 2016) (noting that a "motion to dismiss tests the legal sufficiency of a complaint to determine whether the plaintiff has properly stated a claim").

A complaint is subject to dismissal if it does not "contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (cleaned up)). Factual allegations cannot require speculation or merely be conceivable. See Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 555. This inquiry is "context-specific." Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 256 (4th Cir. 2009).

In considering a motion to dismiss, the "court evaluates the complaint in its entirety, as well as documents attached or incorporated into the complaint." E. I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 440 (4th Cir. 2011) (citing Sec'y of State for Defence v. Trimble Navigation Ltd., 484 F.3d 700, 705 (4th Cir. 2007); Phillips v. LCI Int'l Inc., 190 F.3d 609, 618 (4th Cir. 1999)). The court "may consider documents attached to the complaint or the motion to dismiss so long as they are integral to the complaint and authentic." Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cnty., 684 F.3d 462, 467 (4th Cir. 2012) (quoting Philips v. Pitt Cnty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009)) (cleaned up).

III. ANALYSIS

Habeas petitions filed pursuant to 28 U.S.C. § 2254 challenge a state's custody over a petitioner on the grounds that such custody violates "the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In this case, Ragin challenges his convictions on numerous constitutional, statutory, and international law grounds. But Ragin is time-barred from raising those claims in federal court, and he offers no valid reason to excuse his untimely filing. This Report thus RECOMMENDS the court GRANT Respondent's Motion to Dismiss, (ECF No. 11), and DISMISS Ragin's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, (ECF No. 1).

A. Ragin's Petition is Time-Barred.

Under 28 U.S.C. § 2244(d)(1) a prisoner seeking federal habeas corpus relief from a state court conviction is subject to a one-year statute of limitations, which runs from the latest of the date on which: (A) the judgement becomes final by the conclusion of direct review or the expiration of the time for seeking such review; (B) any state-created barrier to filing a petition is removed; (C) the United States Supreme Court newly recognizes the right asserted; or (D) the factual predicate of the claim could have been discovered through the exercise of due diligence. § 2244(d)(1)(A)–(D). If a petitioner declines to seek certiorari in the United States Supreme Court after exhausting all avenues of direct review in state court, the petitioner's judgment becomes final ninety days after final judgment, when the time for seeking Supreme Court review expires. Gonzalez v. Thaler, 565 U.S. 134, 149–50 (2012). The one-year limitation is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." § 2244(d)(2).

For purposes of federal habeas review, Ragin's convictions became final on January 4, 2017, when the deadline to file a petition of writ of certiorari expired and the federal one-year limitations period began to run. Ragin filed his state habeas petition on October 17, 2017, at which point 286 total days of the federal statute of limitations had run. While his state petition was pending, the statute of limitations was tolled. Tolling ended on August 8, 2019 when the state court dismissed his petition, and the statute of limitations began to run again. It expired 79 days later on October 2, 2019. The petition at issue in this court was filed on July 21, 2022, 1,078 days after his state habeas petition was dismissed; and 1,364 days from the date that Ragin's convictions became final, and 997 days after the federal limitations period expired.[1]

[1] The limitations period would have expired on Saturday, October 26, 2019, the following Monday was October 28, 2019.

Ragin argues that the one-year statute of limitations in 28 U.S.C. § 2244(d) does not bar his petition because the factual predicate to his claims could not be discovered until August 8, 2019, when his petition for writ of habeas corpus was dismissed in Newport News Circuit Court. Pet. (ECF No. 1, at 13). He claims that, since that date, he has pursued post-conviction and collateral review that warrant tolling. Id. Ragin filed a petition for a writ of mandamus in the Supreme Court of Virginia on August 11, 2020, which was refused on January 25, 2021. Resp't Br., Ex. 3 (ECF No. 12-3). His petition for rehearing was denied on March 25, 2021. Resp't Br., Ex. 3 (ECF No. 12, at 6). He later attempted to appeal this decision by seeking a writ a certiorari with the United States Supreme Court, but was unsuccessful. Pet. (ECF No. 1, at 9).

Ragin's petition for a writ of mandamus does not qualify as a tolling event under § 2244(d)(2) because it does not entail review of the evidence in the case or the sentence. See Wall v. Kholi, 562 U.S. 545, 553 (2011) (holding that "collateral review" under § 2244(d)(2) "means a judicial reexamination of a judgement . . . in a proceeding outside of the direct review process" (emphasis added)). While the petition for the writ of mandamus is technically "outside of the direct review process," Wall, 562 U.S. at 553, it does not involve a "judicial examination" of Ragin's conviction or sentence, id. Accordingly, Ragin is not entitled to statutory tolling. See § 2244(d)(2).

Nevertheless, if Ragin's arguments were correct regarding statutory tolling, his petition would still be time barred. Ragin argues that the factual predicate to his claims could not be discovered until August 8, 2019, when his petition for writ of habeas corpus was dismissed in Newport News Circuit Court. Pet. (ECF No. 1, at 13). However, he did not file the petition for a writ of mandamus to the Virginia Supreme Court until August 11, 2020. Resp't Br., Ex. 3 (ECF No. 12-3). Ragin's petition for a writ of mandamus was filed 369 days after he claims the factual

predicate of the claim could have been discovered,[2] beyond the one-year statute of limitations. See § 2244(d)(1). Ultimately, Ragin's petition was not timely.

B. Ragin Presented No Evidence to Warrant Equitable Tolling

In exceptional cases, equitable tolling of the statute of limitations applies when a litigant establishes "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Pace v. DiGugliemo, 544 U.S. 408, 413 (2005). The Fourth Circuit limits equitable tolling to those rare circumstances when impediments external to the petitioner's conduct prevent a timely filing. See Whiteside v. United States, 775 F.3d 180, 184 (4th Cir. 2014). Ragin has not argued for equitable tolling, nor is there any evidence in the record to warrant it.

C. Ragin Presented Insufficient Evidence of Actual Innocence to Overcome the Time-Bar.

Petitioner may also overcome a time-bar by making a credible showing of actual innocence, this requires assertion of new, reliable evidence sufficient to persuade the court no reasonable juror would have found him guilty beyond a reasonable doubt. McQuiggin v. Perkins, 569 U.S. 383, 386 (2013) (noting that this standard is "demanding" and seldom met); Schlup v. Delo, 513 U.S. 298, 327 (1995). To "satisfy the Schlup standard, a petitioner must instead demonstrate that the totality of the evidence would prevent any reasonable juror from finding him guilty beyond a reasonable doubt, such that his incarceration is a miscarriage of justice." Teleguz v. Pearson, 689 F.3d 322, 329 (4th Cir. 2012) (citing Schlup, 513 U.S. at 327). Petitioner has not

[2] Although Ragin claims the factual predicate was first known at this time, he is mistaken. The predicate he relies on—denial of an evidentiary hearing during his state habeas proceedings is not a new fact giving rise to an additional one-year federal limitations period. See Bryant v. Maryland., 848 F.2d 492, 493 (4th Cir. 1988) (holding that claims of error occurring in state postconviction proceeding could not serve as the basis of federal habeas corpus relief).

met this extraordinary burden and has not "support[ed] his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Schlup, 513 U.S. at 324.

The primary evidence Ragin asserts in his federal petition involves (1) the trial court testimony from the state's witnesses; (2) counsel's failure to raise arguments he alleges were meritorious; and (3) his waiver of his right to testify. Pet. (ECF No. 1, at 20–23). However, none of this is new information. These claims were known to Ragin during his original appeal more than seven years ago. Absent new reliable evidence, such as credible witness statements recanting their testimony, the Court cannot grant Ragin an evidentiary hearing. See Schlup at 324, 327; see also Thomas v. Taylor, 170 F.3d 466, 474–45 (4th Cir. 1999) ("An evidentiary hearing in a federal habeas corpus proceeding is mandatory only where there is a factual dispute which . . . would entitle the petitioner to relief and the petitioner has not received a full and fair evidentiary hearing in state court."). Pro se petitions should be "liberally construed," but the court cannot become "an advocate" by creating claims or allegations inadequately pleaded. Estelle v. Gamble, 429 U.S. 97, 106 (1976); Beaudett v. City of Hampton, 775 F.2d 1274, 1277–78 (4th Cir. 1985). For these reasons, Ragin has not asserted sufficient evidence of factual innocence to overcome the time-bar.

IV. CONCLUSION AND RECCOMENDATION

For the foregoing reasons, I conclude that Ragin's claims are time-barred and he has not presented grounds for equitable tolling or sufficient evidence of actual innocence to overcome the time-bar. Accordingly, I RECOMMEND that the Court GRANT Respondent's Motion to Dismiss, (ECF No. 11), and DISMISS Ragin's Petition under 28 U.S.C. § 2254 (ECF No. 1), with prejudice.

V. REVIEW PROCEDURE

By copy of this report and recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing findings and recommendations within fourteen (14) days from the date this report is forwarded to the objecting party by Notice of Electronic Filing or mail, see 28 U.S.C. § 636(b)(1), computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure. Rule 6(d) of the Federal Rules of Civil Procedure permits an additional three (3) days, if service occurs by mail. A party may respond to any other party's objections within fourteen (14) days after being served with a copy thereof. See Fed. R. Civ. P. 72(b)(2) (also computed pursuant to Rule 6(a) and (d) of the Federal Rules of Civil Procedure).

2. A district judge shall make a de novo determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in a waiver of appeal from a judgment of this court based on such findings and recommendations. Thomas v. Arn, 474 U.S. 140 (1985); Carr v. Hutto, 737 F.2d 433 (4th Cir. 1984); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

/s/
Douglas E. Miller
United States Magistrate Judge

DOUGLAS E. MILLER
UNITED STATES MAGISTRATE JUDGE

Norfolk, Virginia

March 15, 2023

CLERK'S MAILING CERTIFICATE

A copy of the foregoing was mailed this date to:

John Ragin, #1355505
c/o VA DOC Centralized Mail Distribution Center
3521 Woods Way
State Farm, VA 23160

A copy of the foregoing was provided electronically this date to:

Craig Winston Stallard
Office of the Attorney General
202 North Ninth Street
Richmond, VA 23219

Fernando Galindo, Clerk

/s/ J.L. Meyers
By_____
Deputy Clerk

March 15
_____, 2023

Applicant Details

First Name	**Nachiketa**
Last Name	**Baru**
Citizenship Status	**U. S. Citizen**
Email Address	**nab4bz@virginia.edu**
Address	**Address** **Street** **3525 Santoro Way** **City** **San Diego** **State/Territory** **California** **Zip** **92130**
Contact Phone Number	**(858) 947-8320**

Applicant Education

BA/BS From	**Pomona College**
Date of BA/BS	**May 2018**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 22, 2022**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Virginia Journal of International Law, Virginia Journal of Law and Technology**
Moot Court Experience	**Yes**
Moot Court Name(s)	**UVA Law Moot Court** **Lile Moot Court**

Bar Admission

Admission(s)	**California**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Duffy, John
jfduffy@law.virginia.edu
(434) 243-8544

Hatchett, Juliet
jhatchett@law.virginia.edu
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Ferzan, Kimberly
kferzan@law.upenn.edu
215-573-6492

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nachiketa Baru
3525 Santoro Way
San Diego, CA 92130
nbaru@cooley.com | (858) 947-8320
June 26, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman
United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a Class of 2022 graduate from the University of Virginia School of Law, and I am writing to apply for a clerkship in your chambers for the term starting August 2024.

I am currently an associate at Cooley LLP, specializing in complex business litigation at both trial and appellate level. In law school, I was on the editorial staff of two journals, a participant on the school's extramural moot court team, and was extensively involved in pro bono work. I have a wide range of exposure to the litigation process and to legal research, in public service as well as in private practice. I believe my experiences have equipped me with the requisite knowledge, practical understanding, and written and oral presentation skills to be a competent clerk.

I am enclosing my resume, my law school transcript, and a writing sample. My writing sample is from a law school jurisprudence course and is substantially my own work, although I incorporated feedback from my professor. You should also be receiving letters of recommendation from Professors John Duffy, Kimberley Ferzan, and Juliet Hatchett.

Please reach out to me at the phone number or email above if I can offer further information. I appreciate your consideration.

Sincerely,

Nachiketa Baru

Nachiketa A. Baru

1605 Brandywine Dr., Charlottesville, VA 22901 • (858) 947-8320 • nbaru@cooley.com

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2022

- GPA: 3.57
- *Virginia Journal of International Law*, Productions Editor
- *Virginia Journal of Law and Technology*, Editorial Board
- Extramural Moot Court
- Peer Advisor
- Virginia Innocence Project
- University of Virginia Honor System Committee, Investigator/Counselor
- Law Democrats, Treasurer
- South Asian Law Students Association, Board Member

Pomona College, Claremont, CA
B.A., Neuroscience, May 2018

- The Student Life, Student Journalist
- 3W Club, Tutor (assisting ESL students with language fluency)

EXPERIENCE

Cooley LLP, San Diego, CA
Associate, November 2022 – Present; *Summer Associate*, Summer 2021

- Perform legal research and draft memos and pleadings in complex business, securities, and appellate civil litigation matters

Office of the Public Defender, San Diego, CA
Intern, Summer 2020

- Performed legal research, reviewed discovery materials, and drafted pleadings
- Drafted motions to dismiss complaints, to suppress and exclude evidence, and to initiate competency proceedings

Professor Kimberly Ferzan, University of Virginia Law School, Charlottesville, VA
Research Assistant, Summer 2020

- Researched case law and reviewed secondary literature on accomplice liability

Law Office of Paul J. Ryan, San Diego, CA
Clerk, March – August 2019

- Drafted pleadings, discovery requests and responses, and settlement agreements
- Prepared for hearings and trials, including managing exhibits and trial binders
- Communicated with clients regarding details of active matters

Jorge F. Gonzales, Esq., San Diego, CA
Legal Assistant, June 2018 – August 2019

- Drafted pleadings and discovery documents in civil and criminal matters
- Drafted questions and prepared exhibits for deposition and trial examinations

Legal Aid Society of San Diego, San Diego, CA
Volunteer, November 2017 – August 2019

- Helped counsel clients on civil matters at state courthouse walk-in clinics
- Drafted complaints, answers, petitions, and other pleadings
- Recognized for outstanding service by organization and California state bar

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Nachiketa Baru

Date: June 08, 2022
Record ID: nab4bz

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2019			
LAW	6000	Civil Procedure	4	B+	Woolhandler,Nettie A
LAW	6002	Contracts	4	A	Cohen,George M
LAW	6003	Criminal Law	3	A-	Bonnie,Richard J
LAW	6004	Legal Research and Writing I	1	S	Ware,Sarah Stewart
LAW	6007	Torts	4	A	Barzun,Charles Lowell
		SPRING 2020			
LAW	6001	Constitutional Law	4	CR	Prakash,Saikrishna B
LAW	6104	Evidence	4	CR	Ferzan,Kimberly
LAW	9200	Federal Litigation Practice	3	CR	O'Keeffe,James
LAW	6005	Lgl Research & Writing II (YR)	2	S	Ware,Sarah Stewart
LAW	6006	Property	4	CR	Harrison,John C
		FALL 2020			
LAW	8002	Bankruptcy (Law & Business)	4	A	Hynes,Richard M
LAW	6103	Corporations	4	B+	Hwang,Cathy
LAW	7018	Criminal Adjudication	3	B+	Brown,Darryl Keith
LAW	7071	Professional Responsibility	2	B+	Sachs,Benjamin Ryan
LAW	9081	Trial Advocacy	3	B+	Cook,John Tandy
		SPRING 2021			
LAW	7160	Computer Crime	3	B+	Bamzai,Aditya
LAW	6105	Federal Courts	4	A-	Re,Richard Macdonald
LAW	7086	Jurisprudence	3	A	Strauss,Gregg
LAW	8010	Patent Law	3	A-	Duffy,John F
LAW	7075	Quantitative Methods	3	A-	Fischman,Joshua
		FALL 2021			
LAW	9298	Appellate Practice	3	B	Stetson,Catherine Emily
LAW	7019	Criminal Investigation	4	A-	Coughlin,Anne M
LAW	6106	Federal Income Tax	4	A-	Hayashi,Andrew T
LAW	8628	Innocence Project Clinic (YR)	4	CR	Givens,Jennifer L
		SPRING 2022			
LAW	7021	Courts	3	B+	Law,David S.
LAW	8629	Innocence Project Clinic (YR)	4	B+	Givens,Jennifer L
LAW	7062	Legislation	4	A-	Nelson,Caleb E
LAW	7144	Negotiation	3	B+	Sachs,Benjamin Ryan

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 26, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Nachiketa Baru

Dear Judge Walker:

I am delighted to recommend Nachi Baru for a clerkship in your chambers. While I was on the Virginia faculty, Nachi was a student in my Spring 2020 Evidence class and then a research assistant for me during the summer of 2020. Nachi is bright and inquisitive, and I recommend him without reservation.

Because Virginia decided to convert classes to pass/fail for the Spring 2020 semester, I cannot make comparative remarks about Nachi's performance on my exam or his performance after we moved to remote teaching after spring break. That said, for the first two months of class, Nachi was a superb student. I teach Evidence using a casefile method, and students are required to represent clients in role. This requires substantial participation. Moreover, this methodology allows students to assess the purposes and the impact of various rules. Nachi was a masterful class participant. He was thoroughly prepared, and he was a student I could count on for an insightful remark that went to the heart of an evidentiary rule. He was clearly one of the best in the class.

I was thus delighted that Nachi was interested in serving as a research assistant for me that summer. I gave Nachi a project on the natural and probable consequences doctrine in criminal law, where accomplices can be responsible not just for the crime they intend to aid but those that flow naturally from them. I also asked him to follow up on case law development after the Supreme Court's Rosemond decision on accomplices' mental states. This research required the ability to identify fine-grained distinctions in the doctrine and to pay close attention to the relationship between facts and law. For this project, Nachi did a first-rate job. He is careful and serious. He works well independently but asks clarifying questions when necessary. And, he delivers a clear, crisp, and fluid work product.

I regret that my departure from UVA prevented me from continuing to have Nachi serve as my research assistant (as well as having him as a student in another class). I know my thinking would have benefitted from spending more time with him. In addition to being very smart, he is also simultaneously serious and congenial. He will make a great sounding board, and he will get along well with his co-clerks. I wholeheartedly recommend him to you.

Sincerely,

Kimberly Kessler Ferzan
Tel. 215-573-6492
kferzan@law.upenn.edu

Difficulty, Uncertainty, and Harm: The Shortcomings of the Barzun and Gilbert Model of Constitutional Conflict Avoidance (Excerpt)

II. Summary

Barzun and Gilbert posit that, in hard Constitutional cases, courts/judges should look to apply a conflict avoidance model. This model would both assist and constrain judicial decision making, by forcing courts to make narrow, fact-bound decisions that are particular only to each individual case, without setting precedent on more abstract Constitutional doctrine. This would, in theory, constrain the breadth of a court's decisional jurisdiction while potentially blunting the role of ideology, given that judge's decisions would apply only to the parties at hand, and not establish broad precedent.

Barzun and Gilbert begin their analysis by making clear that conflict avoidance, as discussed above, should be applied only to those cases which are truly "hard". In other words, conflict avoidance is a tool to be employed in matters "where the demands of law and justice are unclear" and settled legal and moral precepts don't yield an answer.[1] Conflict avoidance is intended to strongly parallel the concept of the least cost avoider ("LCA") from tort law. In tort suits, the LCA paradigm holds that the costs of the underlying harm should be shifted onto the party who, from an ex-ante perspective, could have most easily prevented whatever harm occurred.[2] To translate the LCA framework from torts, where costs are predominantly economic, into the conflict avoidance model of Constitutional law, where the harms often speak to less material concerns, Barzun and Gilbert envision a three-step process.

The first step is to understand, in a given hard case, what the "particularized interests" of the parties in question are.[3] This involves reframing grand statements of Constitutional values into the more prosaic, instrumental concerns of the actual individual parties. Barzun and Gilbert offer a hypothetical of a high school student who wears a Confederate flag t-shirt to school.[4] The student may claim an interest in being able to express pride in their heritage, while the school principal who seeks to ban such a shirt may claim an interest in fostering an inclusive learning environment.[5] These concerns would stand in contrast to a suit under the more traditional model,

[1] Charles L. Barzun & Michael D. Gilbert, Conflict Avoidance in Constitutional Law, 107,VA. L. REV. 1 (2021), at 10.
[2] *Id.*, at 11.
[3] *Id.*, at 13.
[4] *Id.*, at 16.
[5] *Id.*

where both parties may attempt to invoke big-picture ideas like freedom of speech or equal protection. Attempting to draw out particularized interests in this way has the advantage, for Barzun and Gilbert, of putting the nature of the actual dispute into focus, allowing courts to avoid being tripped up by considerations of abstract ideals that are often not even justiciable.[6]

The next step in the analysis is to consider the respective avoidance costs borne by either party.[7] Courts must determine how costly it would have been for either party to entirely avoid the confrontation which led to the legal action in the first place.[8] Compared to the tort context, "costs" in Constitutional conflict avoidance might refer not just to economic burdens, but to the psychological toll suffered by individuals in the course of their avoidance.[9] Using an example of a gay couple denied service by a wedding florist, Barzun and Gilbert state that a court would have to consider the psychological costs borne both by the couple – who might have been hurt by the prospect of having to find a non-discriminatory florist – as well as the florist, who might have been psychologically distressed by having to "condone" the gay wedding by referring the couple to another florist.[10]

The third and final step of the conflict avoidance analysis is relatively straightforward. Once a court has inquired into the particularized interests of the parties and then weighed the costs both parties would have suffered if attempting avoidance, the court should rule in favor of the party who would have borne the higher cost, and against the party who could have more easily avoided.[11]

Barzun and Gilbert then apply their conflict avoidance model to certain paradigmatic Supreme Court cases, which in their view help illustrate the pragmatic benefits of their model. Among the positives of conflict avoidance, in Barzun and Gilbert's eyes, is that it would force courts to think more critically about the actual parties at the center of a given action, instead of allowing disconnected proxies to take center stage.[12] From a pragmatic perspective, Barzun and Gilbert believe that a conflict avoidance model would also disincentivize speculative litigation[13]

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[6] *Id.*, at 19-20.
[7] *Id.*, at 26.
[8] *Id.*
[9] *Id.*, at 28.
[10] *Id.*, at 28-29.
[11] *Id.*, at 30-31.
[12] *Id.*, at 34.
[13] *Id.*, at 38.